IN THE SUPREME COURT OF FLORIDA

CASE NO. SC00-1131

DCA CASE NO. 4D99-3270

KEITH SCHUMAKER,

Petitioner,

-vs-

STATE OF FLORIDA,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW FROM THE DISTRICT COURT OF APPEAL OF FLORIDA, FOURTH DISTRICT

BRIEF OF RESPONDENT ON THE MERITS

ROBERT A. BUTTERWORTH
Attorney General
Tallahassee, Florida

MICHAEL J. NEIMAND
Chief, Criminal Law

M. REBECCA SPRINGER
Assistant Attorney General
Florida Bar No. 0079839
Office of the Attorney General
The Republic Tower
110 S.E. 6th Street, 10th Floor
Fort Lauderdale, FL 33301
Telephone:(954) 712-4600
Facsimile:(954) 712-4761

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INTRODUCTION

The Petitioner, Keith Schumaker, was the Defendant in the trial court and the Appellant in the Fourth District Court of Appeal. THE STATE OF FLORIDA, was the prosecution in the trial court and the Appellee in the Fourth District Court of Appeal. The parties shall be referred to as Petitioner and Respondent in this brief. The symbol "App." followed by a colon and page number refers to the appendix to this brief, containing a conformed copy of the slip opinion of the Fourth District Court of Appeals in the instant cause.

CERTIFICATE OF TYPE SIZE AND STYLE

Counsel for the Respondent, the State of Florida, hereby certifies that 12 point Courier New, a font that has 10 characters per inch, is used in this brief.

STATEMENT OF THE CASE AND FACTS

The State is in substantial agreement with the Defendant’s version of the case and facts in so far as they are accurate and non-argumentative. Any additional facts which the State seeks to bring to the attention of the Court are contained in the argument portion of the brief.

QUESTION PRESENTED

WHETHER PETITIONER IS ENTITLED TO RESENTENCING ON COUNT I OF THE INFORMATION, PURSUANT TO HEGGS V. STATE, 25 FLA. L. WEEKLY S137 (FLA. FEBRUARY 17, 2000), ON REHEARING, 25 FLA. L. WEEKLY S359, 360 (FLA. MAY 4, 2000)?

SUMMARY OF THE ARGUMENT

The Petitioner argues that because this Court in Trapp v. State, 25 Fla. L. Weekly S429 (June 1, 2000), resolved the "window period" issue adversely to the Fourth District Court's position as outlined in Schumaker v. State, 25 Fla. L. Weekly D1117 (Fla. May 10, 2000), and the Petitioner's offense falls within the "window period" applicable to Heggs v. State, 25 Fla. L. Weekly S137 (Fla. February 17, 2000), on rehearing, 25 Fla. L. Weekly S359, 360 (Fla. May 4, 2000), he is entitled have his sentence vacated and this cause remanded for resentencing.

The State would however argue, that because the Petitioner cannot show that he was adversely affected by the amendments made by Chapter 95.184, where he received a departure sentence based on

an improperly scored guidelines scoresheet, he is not necessarily entitled to relief.

ARGUMENT

THE PETITIONER IS NOT ENTITLED TO RESENTENCING ON COUNT I OF THE INFORMATION, PURSUANT TO HEGGS V. STATE, 25 FLA. L. WEEKLY S137 (FLA. FEBRUARY 17, 2000), ON REHEARING, 25 FLA. L. WEEKLY S359, 360 (FLA. MAY 4, 2000).

The Petitioner argues that because his case falls within the "window period" for challenging sentences under the 1995 guidelines, he is entitled to reversal and remand for resentencing where he scored ninety-two (92) instead of ninety-one (91) points for his "level nine (9)" offense, and was assessed eighty (80) rather than forty (40) points for "sexual penetration" under victim injury points. Specifically, the Petitioner argues that although he received a departure sentence of three hundred (300) months, that sentence was imposed from an erroneously scored sentencing guidelines scoresheet, rendering the base from which the trial judge imposed his departure improper.

Initially, the Respondent would agree that the Petitioner's case falls within the "window period" approved by this Court in Trapp v. State, 25 Fla. L. Weekly S429 (June 1, 2000), where his offense occurred on May 13 or 14, 1997. As such, contrary to the decision below in Schumaker v. State, 25 Fla. L. Weekly D1117 (Fla. 4th DCA May 10, 2000), the Petitioner has standing to raise a constitutional challenge to chapter 95-184. However, with regard to the Petitioner's argument that he is "clearly entitled to relief" under this Court's revised opinion in Heggs, the Respondent would argue that the revised opinion did not directly address the particular facts of the Petitioner's case.

In the revised opinion, this Court ruled that "only those persons adversely affected by the amendments made by chapter 95-184 may rely on our decision here to obtain relief." Heggs v. State, 25 Fla. L. Weekly S137 (Fla. February 17, 2000), on rehearing, 25 Fla. L. Weekly S359, 360 (Fla. May 4, 2000). Because the Petitioner did not receive a guidelines sentence, but instead, a departure sentence, the Respondent would argue that when this Court reasoned, "stated another way, in the sentencing guidelines context, we determine that if a person's sentence imposed under the 1995 guidelines could have been imposed under the 1994 guidelines **(without departure)**, then that person shall not be entitled to

relief under our decision here" (Emphasis added), this Court was not addressing instances where a departure sentence was imposed in the first place. Id.

Further, with regard to the Petitioner's guidelines score, the guidelines scoresheet was improperly calculated in the Petitioner's favor[1]. Because the Petitioner was convicted under Section 794.011(3), Florida Statutes of sexual battery with force likely to cause serious personal injury, which is a life felony[2] and not a first degree felony, the statutory maximum the Petitioner could

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[1] In the opinion below, the Fourth District correctly acknowledged that the Petitioner was convicted of "sexual battery with force or injury," which falls under Section 794.011(3), Florida Statutes. Under both the (1994)and (1995) sentencing guidelines, Section 794.011(3) is listed as a life felony, level ten (10) offense. It should be noted however, that when the Petitioner's scoresheet was completed, and as acknowledged in the Petitioner's Brief, (page(s) 5-6), his Section 794.011(3) conviction, which was charged in the Information tracking the language of that Section, was listed as a first degree felony, level nine (9) offense in error. As such, under the (1995) guidelines, his total sentence points for a life felony, level (10) offense, equaled (236) points, his state prison months equaled (208) months, and he scored (260) maximum prison months or (21.6) years. Under the (1994) guidelines the Petitioner's total sentence points for a level ten (10) offense would have been (196)(because under the (1994) guidelines "Sex Penetration" scores only forty (40) points instead of eighty (80) under the (1995) guidelines), his state prison months would have equaled (168) and his maximum prison months would have equaled (210) or (17.5) years.

[2] This offense was a level ten (10) offense, and not a level nine (9) offense, which the Petitioner's erroneously prepared scoresheet reflects.

have received under a departure sentence at the time the (1995) sentencing guidelines were in effect, was life in prison. Section 921.0016(1)(e), Florida Statues. Similarly, at the time the (1994) sentencing guidelines were in effect, a conviction under Section 794.011(3) was also a life felony, level ten offense, with a statutory maximum of life in prison.[3] Section 921.0016(1)(e), Florida Statues.

To that end, the Respondent would argue it would be reasonable to infer that in the departure sentencing context, if the maximum departure sentence that could be imposed at the time of both the (1995) and (1994) guidelines, would have been life in prison, (instead of thirty (30) years under the erroneously scored scoresheet), the Petitioner is not automatically entitled to reversal and remand for resentencing. Mackey v. State, 719 So.2d 284 (Fla. 1998). In Mackey, this Court reviewed a decision of the Third District Court of Appeal in which the district court found that where a sentencing guidelines scoresheet was completed in error, reversal and remand for resentencing were necessary because,

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[3] At the time of the (1994) guidelines, a life felony was punishable by "a term of imprisonment for life or by a term of imprisonment not exceeding (40) years." Section 775.082(3)(a), Florida Statues. At the time of the Petitioner's case and the (1995) sentencing guidelines, a life felony was punishable by "a term of life or by imprisonment for a term of years not exceeding life imprisonment. Section 775.082(3)(a)(3).

"[A] trial court must have the benefit of a properly prepared scoresheet before it can make a fully informed decision on whether to depart from the recommended guidelines sentence." Id. at 284. This Court concluded that although it is "important for the trial court to have the benefit of a properly calculated scoresheet when making a sentencing decision," it "does not necessarily follow that all cases involving scoresheet errors must be automatically reversed for resentencing." Id. at 284; Rubin v. State, 721 So.2d 716 (Fla. 1998)

In Mackey, the sentencing guidelines scoresheet error benefitted the defendant because his maximum prison years were scored to be five (5) years shorter than they actually were[4]. Id. This court determined that where a defendant may "have actually benefitted" from the use of an erroneous scoresheet, a per se rule of reversal in every instance where the trial court has utilized an erroneous scoresheet "is unnecessary." Id. at 285. With regard to the instant Petition, the Respondent would argue that where the Petitioner may have actually benefitted from the use of an erroneous scoresheet, he is not automatically entitled to reversal and remand for resentencing. Id. Pursuant to his erroneously

[4] Under the 1991 scoresheet Mackey, scored (4.5 to 9)years and under the 1994 scoresheet the defendant scored (9.5 to 15.8) years.

scored scoresheet, which listed the Petitioner's offense as a first degree felony, level nine (9), the Petitioner was facing a statutory maximum of only thirty (30) years for a departure sentence.[5] However, if scored at the time of the (1994) guidelines, and pursuant to a properly scored scoresheet reflecting his actual level of ten (10) for a life felony, the Petitioner would have faced a statutory maximum of life in prison. Section 921.0016(1)(e).

Although in the instant case, under the (1994) guidelines, the Petitioner would have properly scored between (10.5 and 17.5) years for a level ten (10), life felony, his actual improperly scored scoresheet pursuant to the (1995) sentencing guidelines reflected between (11.5 and 19.16). As such, his (1995) guidelines sentence was slightly higher (1.66 years) than his exposure under the (1994) guidelines. The Respondent would however argue that this case should still not be remanded. While the Respondent would agree the Petitioner would not have benefitted if he had received a guidelines scoresheet sentence, as his (1994) sentence would have resulted in a slightly lesser time, even if properly scored,

[5] The Statutory maximum sentence for a first degree, level nine (9) felony, at the time of the Petitioner's sentencing, was thirty (30) years in prison. Sections 775.082 and 921.0016(e), Florida Statues.

Respondent would maintain that this Court should focus on the type of sentence the Petitioner actually received, a departure sentence, and not what the Petitioner would have received on a guidelines sentence.

As noted above, a departure sentence, if properly imposed, is limited only by the statutory maximum of the crime for which it was imposed. Section 921.0016(1)(e). In this case, the decision of the Fourth District below, affirmed without comment, the Petitioner's challenge of the trial court's decision, and basis for the departure sentence of twenty-five (25) years. As such, the lower appellate court approved the departure and found it was properly imposed. Indeed, in the instant Petition, the Petitioner does not challenge the Fourth District's approval of the basis for the trial court's departure. Under Section 921.0016(2), "the failure of a trial court to impose a sentence within the sentencing guidelines is subject to appellate review under chapter 924, but the extent of departure from the guidelines sentence is not subject to appellate review." In this sense, the Petitioner clearly benefitted from being erroneously scored pursuant to the (1995) sentencing guidelines where his maximum exposure was thirty (30) years instead of life in prison. To that extent, the State would argue that the Petitioner cannot show he was adversely affected by

the amendments made by chapter 95-184 where with regard to his departure sentence under the 1994 sentencing guidelines, the Petitioner's charge[6] was a level ten (10) life felony. Sections 775.082; 921.0012, Florida Statutes (1994); Mackey v. State, 719 So.2d 284 (Fla. 1998).

Finally, the State would argue that it is clear beyond a reasonable doubt that the trial court, if faced with resentencing the Petitioner based on a properly scored (1994) guidelines scoresheet would have imposed the same departure sentence. Hines v. State, 587 So.2d 620 (Fla. 2d DCA 1991). It should be noted that in this case the difference between the maximum guidelines prison terms under the actual scoresheet used, and a properly scored scoresheet is slight. Under the erroneously scored (1995) sentencing guidelines scoresheet the Petitioner scored (19.16) years. Under a properly scored (1994) scoresheet the Petitioner would score (17.5) years. The difference, although not in the Petitioner's favor, amounts to only a (1.66) year increase. As such, it is clear the trial court would not waiver from it's twenty-five (25) year departure.

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[6] The Petitioner was charged under Section 794.011(3), with Sexual battery with force likely to cause serious personal injury.

Furthermore, because in determining a departure sentence the court is only bound by the statutory maximum, the trial court would clearly not have lowered the twenty-five (25) year term, had it known that the statutory maximum for the Petitioner's crime was not thirty (30) years, but life in prison. As such, the Respondent would argue that this case need not be reversed and remanded for resentencing. Id. However, should this Court find that it is not clear beyond a reasonable doubt that the trial court would have imposed the same sentence, the State would agree that it is appropriate to remand for the limited purpose of the trial court's determination of this issue. Smith v. State, 2000 WL 668492 (Fla. 2d DCA May 24, 2000); Brown v. State, 508 So.2d 522 (Fla. 2d DCA 1987)(remand with directions appropriate for trial court to demonstrate without hearing that the departure sentence would have been imposed notwithstanding the scoresheet error).

CONCLUSION

WHEREFORE, the Respondent would request that this Honorable Court affirm the Petitioner's sentence and deny the Petitioner's request that his sentence be reversed and remanded for resentencing.

Respectfully Submitted,

ROBERT A. BUTTERWORTH
Attorney General

MICHAEL J. NEIMAND
Chief, Criminal Law

M. REBECCA SPRINGER
Assistant Attorney General
Florida Bar Number 0079839
Office of the Attorney General
Criminal Appeals Division
110 SE 6th Street - 9th Floor
Fort Lauderdale, FL 33301
(954) 712-4600 Fax 712-4761

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **BRIEF OF RESPONDENT** was mailed to Joseph Chloupek, Assistant Public Defender, 421 Third Street, 6th Floor, West Palm Beach, Florida 33401 on this 26th day of June, 2000.

M. REBECCA SPRINGER
Assistant Attorney General