

IN THE SUPREME COURT OF FLORIDA

KEITH SCHUMAKER, )  
 )  
 Petitioner, )  
 )  
 vs. ) CASE NO. SC00-1131  
 )  
 STATE OF FLORIDA, )  
 )  
 Respondent. )  
 )  
 )  
 )  
 \_\_\_\_\_ )

PETITIONER'S BRIEF ON THE MERITS

RICHARD L. JORANDBY  
Public Defender  
15th Judicial Circuit of Florida  
Criminal Justice Building  
421 Third Street/6th Floor  
West Palm Beach, Florida 33401  
(561) 355-7600

JOSEPH R. CHLOUPEK  
Assistant Public Defender  
Florida Bar No. 434590  
Attorney for Keith Schumaker

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PRELIMINARY STATEMENT

Petitioner, Keith Schumaker, was the defendant in the prosecution in the Criminal Division of the Circuit Court of the Fifteenth Judicial Circuit, in and for Palm Beach County, Florida. Before the Fourth District Court of Appeals, Respondent was Appellee, and Petitioner was Appellant. In the brief, the respective parties will be identified as they appear before this Court.

The following symbol will be used:

"R"                      Record on Appeal

"T"                      Transcript on Appeal.

CERTIFICATE OF TYPE AND SIZE

In accordance with the Florida Supreme Court Administrative Order, issued on July 13, 1998, and modeled after Rule 28-2 (d), Rules of the United States Court of Appeals for the Eleventh Circuit, counsel for Respondent hereby certifies that the instant brief has been prepared with 12 point Courier New type, a font that has 10 characters per inch.

STATEMENT OF THE CASE AND FACTS

Petitioner was charged by information with sexual battery with actual force likely to cause serious bodily injury, aggravated assault with intent to commit a felony, and kidnapping (R 7-8). He was found guilty as charged on Counts I and II, but not guilty on Count III, after a jury trial (R 183, T. 1357). Subsequently, the trial court granted a defense motion to dismiss Count II as violating Petitioner's double jeopardy rights (T 1400). Thereafter, Petitioner was sentenced to 300 months imprisonment on Count I, despite the fact that his sentencing guidelines scoresheet reflected a permitted range of 138 to 230 months prison (R 216-219, 235; T. 1449-1450). Petitioner's sentencing guidelines scoresheet scored his primary offense, sexual battery with actual force, a "level 9" offense, as 92 points, rather than 91 points; additionally, Petitioner received 80 points for "sexual penetration," rather than 40 points, in calculating his guidelines scoresheet. Defense counsel at trial did not object to use of a 1995 version of the sentencing guidelines in preparing Petitioner's scoresheet below. Notice of Appeal was filed on September 17, 1999 (R 241).

Thereafter, Petitioner appealed his conviction and sentence to the Fourth District Court of Appeal, (DCA) which rejected all claims raised, including a supplemental point on appeal concerning

enactment of modifications to the sentencing guidelines via a Session Law violating the "single subject" clause of the Florida Constitution, Chapter 95-184, see Schumaker v. State, 25 Fla. Law Weekly D1117 (Fla. 4th DCA, May 10, 2000). Although the Fourth DCA recognized this Court's decision in Heggs v. State, 25 Fla. Law Weekly S137 (Fla., February 17, 2000) finding Chapter 95-184 unconstitutional, that Court held that Petitioner lacked standing to raise this challenge, since the charged offense occurred on May 13 or 14, 1997, which was outside the "window period" identified by the Fourth DCA for "single subject" challenges to the 1995 sentencing guidelines, see e.g. Bortel v. State, 743 So.2d 595 (Fla. 4th DCA 1999). However, in Schumaker the Fourth DCA did certify conflict between that Court and the Second DCA's decision in Heggs v. State, 718 So.2d 263,264, n.1 (Fla. 2nd DCA 1998) approved 25 Fla. Law Weekly S137 (Fla. February 17, 2000), as to the applicable window period, October 1, 1995 through October 1, 1996 (Bortel) or October 1, 1995- May 24, 1997(Heggs,) 25 Fla. Law Weekly at D1117. This appeal follows.

SUMMARY OF ARGUMENT

This court in Trapp v. State, 25 Fla. Law Weekly s429 (June 1, 2000) resolved the "window period" question adversely to the Fourth DCA's position, as relied on in Schumaker v. State, 25 Fla. Law Weekly D1117 (Fla. May 10, 2000). As a consequence, Petitioner's offense falls within the window period for application of this Court's decision in Heggs v. State, 25 Fla. Law Weekly S137 (Fla. February 17, 2000) modified on rehearing 25 Fla. Law Weekly S359, 360 (Fla. May 4, 2000). Wherefore, this cause must be vacated and remanded with directions.

**ARGUMENT**

**POINT ON APPEAL**

PETITIONER IS ENTITLED TO RESENTENCING ON COUNT I OF THE INFORMATION, PURSUANT TO HEGGS V. STATE, 25 FLA. LAW WEEKLY S137, 140 (Fla. February 17, 2000) ON REHEARING 25 FLA. LAW WEEKLY S359, 360 (Fla. May 4, 2000).

In Schumaker v. State, 25 Fla. Law Weekly D1117 (Fla. 4th DCA May 10, 2000), the Fourth DCA rejected Petitioner's "single subject" constitutional challenge to Chapter 95-184, Laws of Florida (1995), the legislative source for the 1995 sentencing guidelines under which Petitioner was sentenced below. In this Court's subsequent Heggs decision on rehearing, 25 Fla. Law Weekly S359, 360 (Fla. May 4, 2000), this Court modified its original decision, Heggs v. State, 25 Fla. Law Weekly S137 (Fla. February 17, 2000) by holding". . . only those persons adversely affected by the amendments made by Chapter 95-184 may rely on our decision here to obtain relief. 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 a departure), then that person shall not be entitled to relief under our decision here," id. (citations omitted).

In Petitioner's case, he clearly would be entitled to relief under this Court's May 4, 2000 Heggs decision, since he scored 92 rather than 91 points for his "level 9" primary offense, and he was



assessed 80, rather than 40 points, for "sexual penetration" under victim injury. Although Petitioner received a departure sentence of 300 months under Count I of the Information, this sentence was imposed from an erroneously scored sentencing guidelines scoresheet, rendering the base from which the trial judge imposed his departure improper, and hence the error not harmless under Heggs II.

Finally, as to the "window period" in which Petitioner's constitutional challenge was made, this Court resolved this issue adverse to the Fourth DCA's decision below in Trapp v. State, 25 Fla. Law Weekly S429 (Fla. June 1, 2000) where this Court adopted the "window period" found by the Second DCA in Heggs; to wit, October 1, 1995 to May 24, 1997, 25 Fla. Law Weekly at S431. As a result, Petitioner is indeed entitled to relief under Heggs.

As a consequence, the Fourth DCA's decision in Schumaker v. State, 25 Fla. Law Weekly D1117 (Fla. 4th DCA May 4, 2000) must be vacated and remanded with directions that Petitioner be resentenced on Count I of the Information utilizing a correctly-scored sentencing guidelines scoresheet, as per this Court's decision in Heggs and Heggs II.

Respectfully submitted,

RICHARD L. JORANDBY  
Public Defender  
15th Judicial Circuit of Florida  
Criminal Justice Building  
421 Third Street/6th Floor  
West Palm Beach, Florida 33401  
(561) 355-7600

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JOSEPH R. CHLOUPEK  
Assistant Public Defender  
Florida Bar No. 434590

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to M. Rebecca Springer, Assistant Attorney General, 110 S.E. 6th Street, Fort Lauderdale, Florida 33301 by mail this \_\_\_\_\_ day of June, 2000.

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Attorney for Keith Schumaker