IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO. SC00-2549
(4th DCA Case No. 4D00-1861)

STATE OF FLORIDA,

Petitioner,

vs.

GWENDA JEAN LEMON,

Respondent.

PETITIONER'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Respondent was the movant and Petitioner was the respondent in the Criminal Division of the Circuit Court of the Seventeenth Judicial Circuit, in and for Broward County, Florida. Respondent was the Appellant and Petitioner was the Appellee in the Fourth District Court of Appeal. In this brief, the parties shall be referred to as they appear before this Honorable Court except that Petitioner may also be referred to as the State.

All emphasis in this brief is supplied by Petitioner unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

Respondent, Gwenda Jean Lemon, committed certain offenses on March 22, 1995 in Broward County Circuit Court case number 96-18032 CF and on July 18, 1996 in Broward County Circuit Court 96-18086 CF. Accordingly, Respondent was sentenced utilizing a 1994 guidelines scoresheet in case number 96-18032 CF and she received a ninety-six month sentence. A 1995 guidelines scoresheet was prepared in case number 96-18086 CF but the trial court departed upwardly from the guidelines in sentencing Respondent to a second ninety-six month sentence in that case.

Respondent filed a motion to correct sentence in the Circuit Court of the Seventeenth Judicial Circuit, in and for Broward County, arguing that, pursuant to this Court's decision in Heggs v. State, 759 So. 2d 620 (Fla. 2000), she was entitled to resentencing under the 1994 guidelines in these two cases, 96-18032 CF and 96-18086 CF. Following a response from the State, the trial court denied her motion and Respondent filed an appeal of the trial court's order in the Fourth District Court of Appeal in case number 4D00-1861.

On appeal, the State pointed out that Respondent was not entitled to resentencing using a 1994 guidelines scoresheet pursuant to Heggs in case number 96-18032 CF since Respondent was originally sentenced utilizing a 1994 guidelines scoresheet. The State also argued that Respondent was not entitled to relief in

case number 96-18086 CF because the sentence imposed in that case was an upward departure; it could have been imposed even if a 1994 guidelines scoresheet had been prepared in that case. Stated another way, Respondent was unable to show prejudice under Heggs because Respondent could have received the same sentence regardless of whether the trial court utilized a 1994 guidelines scoresheet or a 1995 guidelines scoresheet.

The Fourth District issued an opinion, Lemon v. State, 769 So. 2d 417 (Fla. 4th DCA 2000), in which that court silently agreed that Petitioner was entitled to no relief in case number 96-18032 CF, the case in which a 1994 guideline scoresheet had been prepared. However, the appellate court found that it was not clear whether Respondent was entitled to relief in case number 96-18086 CF, the case in which a 1995 guideline scoresheet had been prepared.

The Fourth District rejected the State's argument that Respondent was not entitled to relief under any circumstances "because the departure sentence **could** have been imposed even if the 1994 guidelines had been used." Lemon, 769 So. 2d at 418 (emphasis added). Instead, the Fourth District found that Respondent might be entitled to relief where it could not be shown that the trial court **would** have imposed the same 1995 guidelines departure sentence under the 1994 guidelines. Accordingly, the Fourth District reversed the order denying Petitioner's motion as it pertained to

the upward departure sentence and remanded the case for the trial court to consider whether it would have imposed the same upward departure sentence if presented with a 1994 guidelines scoresheet.

The State sought certification of conflict with this Court's decision in Heggs v. State, 759 So. 2d 620 (Fla. 2000), and the decisions of the Second District Court in Kwil v. State, 768 So. 2d 502 (Fla. 2nd DCA 2000), and Ray v. State, 772 So. 2d 18, but certification of conflict was denied by the district court's order of November 1, 2000. However, the district court stayed the mandate on December 12, 2000 and this Court accepted discretionary jurisdiction on June 15, 2001.

SUMMARY OF THE ARGUMENT

The Fourth District erred in reversing the denial of Respondent's motion to correct sentence and remanding for consideration of whether it could be shown that the trial court, given a 1994 guideline scoresheet, **would** have imposed the same departure sentence that it imposed given a 1995 guidelines scoresheet. First, it should be sufficient to show that the trial court **could** have imposed the same departure sentence under either the 1994 or 1995 sentencing schemes. Second, given the fact that this was an appeal from a motion to correct illegal sentence, it was inappropriate to "remand for consideration" of whether the trial court would have imposed the same sentence. This is an evidentiary determination not appropriate for resolution in a Fla. R. Crim. P. 3.800(a) proceeding. Because the trial court's order denying the motion to correct sentence should have been affirmed in its entirety, this Court must quash the decision of the appellate court insofar as that court purported to reverse the trial court's denial of the motion to correct as to case number 96-18086 CF.

ARGUMENT

THE TRIAL COURT WAS CORRECT IN SUMMARILY DENYING APPELLANT'S MOTION TO CORRECT SENTENCE UNDER HEGGS SINCE THE UPWARD DEPARTURE SENTENCE *COULD* HAVE BEEN IMPOSED UNDER THE 1994 GUIDELINES AS WELL AS THE 1995 GUIDELINES AND THE FOURTH DISTRICT ERRONEOUSLY REVERSED AND REMANDED FOR CONSIDERATION OF WHETHER THE TRIAL COURT *WOULD* HAVE IMPOSED THE SAME UPWARD DEPARTURE.

In the instant case, Respondent, Gwenda Jean Lemon, filed a Fla. R. Crim. P. 3.800(a) motion asserting that she was entitled to resentencing pursuant to Heggs v. State, 759 So. 2d 620 (Fla. 2000). The trial court denied that motion and Respondent appealed the order to the Fourth District Court of Appeal. The Fourth District reversed the trial court's denial of the motion insofar as it denied relief in case number 96-18086 CF, a case in which Respondent was sentenced to a upward departure. The State asserts that the Fourth District acted erroneously in partially reversing the trial court's order of denial.

In the opinion issued by the Fourth District addressing the denial of Respondent's motion, that court said:

> We reject the state's argument that because the departure sentence **could** have been imposed even if the 1994 guidelines had been used, appellant is not entitled to relief. ... Nonetheless, relief may not be due where it can be shown that the trial court **would** have imposed the same 1995 guidelines departure sentence under the 1994 guidelines. We therefore reverse and remand for consideration

of this point.

Lemon v. State, 769 So. 2d 417, 418 (citations omitted)(emphasis supplied).

This Court, in Heggs, held that the 1995 amendments to the 1994 Guidelines were, for a time, unconstitutional because the chapter law which instituted the amendments violated the single subject rule. This Court later found that only people who committed their offenses during the window period from October 1, 1995, to May 24, 1997, had standing to attack sentences imposed under the 1995 guidelines on the grounds that the sentences were imposed pursuant to these unconstitutional statutory amendments. Trapp v. State, 760 So. 2d 924 (Fla. 2000). In turn, only those people "adversely affected" by the unconstitutional amendments were entitled to relief. Heggs, 759 So. 2d at 627.

Although Respondent appears to have standing to assert a Heggs challenge in case number 96-18086 CF since the offenses in that case were committed on July 18, 1996, within the window period established by Trapp, and since a 1995 guideline scoresheet was prepared in that case, Respondent is not entitled to Heggs relief because Respondent was not adversely affected by the unconstitutional amendments to the guidelines. Respondent was not adversely affected because the sentence imposed in 96-18086 CF was an upward departure sentence.

In other words, because the sentence was an upward departure,

Respondent could still have received the same sentence regardless of whether the trial court prepared a 1994 guidelines scoresheet or a 1995 guidelines scoresheet. Respondent thus failed to demonstrate that she was adversely affected by the use of a 1995 scoresheet as is required by Heggs. Cf., Hines v. State, 587 So. 2d 620 (Fla. 2d DCA 1991)(error in calculation of scoresheet harmless where departure sentence would have been imposed regardless), approved sub nom., State v. Mackey, 719 So. 2d 284 (Fla. 1998)(error in use of wrong scoresheet harmless where its use benefitted rather than harmed defendant); Rubin v. State, 734 So. 2d 1089 (Fla. 3d DCA 1999)(error in scoresheet calculation harmless where trial court would have imposed departure sentence anyway). Accordingly, the trial court properly denied her claim for relief on this ground.

The Second District recognized that Heggs relief was not available for upward departure sentences in Kwil v. State, 768 So. 2d 502 (Fla. 2d DCA 2000), and Ray v. State, 772 So. 2d 18 (Fla. 2d DCA 2000). In both Kwil and Ray, the Second District noted that the record reflected that the trial court sentenced the defendants to an upward departure sentence based on three statutory factors that were equally valid under the 1994 and 1995 sentencing guidelines. The Second District stated that because the defendants were not, therefore, adversely affected by the unconstitutional amendments to the sentencing guidelines, they were not entitled to relief.

This Court's own decision in Heggs supports the State's reasoning in the instant case and the Second District's reasoning in Kwil and Ray. Although the facts of the Heggs case are distinguishable from Lemon, Kwil, and Ray in that Heggs did not involve a upward departure sentence, the general principles announced in Heggs are still applicable to the instant case. In Heggs, this Court held that relief would not be due where it could be shown that the trial court **could** have imposed the same 1995 guidelines sentence under the 1994 guidelines without a departure. In so doing, this Court did not require the trial court, in denying a Heggs claim, to demonstrate that it **would** have imposed the same sentence under the 1994 guidelines; rather, this Court made it clear that it was sufficient to demonstrate that the trial court **could** have imposed the same sentence under the 1994 guidelines.

This is contrary to the Fourth District's conclusion in the instant case that "relief may not be due where it can be shown that the trial court **would** have imposed the same 1995 guidelines departure sentence under the 1994 guidelines." Lemon, 769 So. 2d at 418 (emphasis added). Essentially, the Fourth District has imposed a heavier burden than Heggs allows.

Other cases support the State's reasoning. For example, Heggs does not apply in cases where a defendant is sentenced as a habitual offender. Arce v. State, 762 So. 2d 1003 (Fla. 4th DCA 2000)(a habitual offender sentence is not subject to the guidelines

provisions of section 921.001); Ford v. State, 763 So. 2d 1273 (Fla. 4th DCA 2000)(same). See also, s. 775.084(4)(g), Fla. Stat. (1997) ("A sentence imposed under this section [the habitual offender section] is not subject to s. 921.001 [the guidelines].")(clarification added); Allen v. State, 740 So. 2d 1180 (Fla. 2d DCA 1999); Robinson v. State, 654 So. 2d 1302 (Fla. 5th DCA 1995)(affirming denial of rule 3.800 motion based on claim that sentence was illegal due to scoresheet errors where defendant had been sentenced as habitual offender and was not subject to sentencing guidelines).

Although a guidelines scoresheet must be prepared even in habitual offender cases, a defendant who is sentenced as a habitual offender is not sentenced pursuant to the guidelines and is therefore not "adversely affected" by any errors in the preparation of the scoresheet. It is similarly arguable that although a guidelines scoresheet was prepared in the instant case, the defendant, by virtue of being sentenced to an upward departure sentence, was sentenced **outside the guidelines**. That is, because when the trial court found clear and convincing reasons to depart from the guidelines, the trial court essentially found that the guidelines did not apply and sentenced the defendant outside the guidelines to what was, effectively, a non-guidelines sentence. Respondent was therefore not adversely affected by any errors in the preparation of the scoresheet, including the error of utilizing

a 1995 scoresheet instead of a 1994 scoresheet.

It is interesting to note that subsequent to the Fourth District's issuance of the Lemon opinion, the Fourth District issued an opinion in another case, McCray v. State, 769 So. 2d 1126 (Fla. 4th DCA 2000). In McCray, the Fourth District affirmed the denial of a Fla. R. Crim. P. 3.800(a) motion in which the appellant had entered a plea that provided for a specific sentence with the understanding that the sentence was an upward departure from the 1995 sentencing guidelines. The district court stated that under the circumstances the appellant could not claim that his sentence was adversely affected by the amendment to the 1995 sentencing guidelines in order to qualify for resentencing under Heggs. The State would submit that the McCray opinion actually supports the State's position in this case and conflicts with the reasoning in Lemon.

Moreover, in order to file a motion under Fla. R. Crim. P. 3.800(a), an illegal sentence must be apparent from the face of the record or, in other words, the issue must be capable of resolution without an evidentiary determination. State v. Callaway, 658 So. 2d 983, 987-988 (Fla. 1995). To inquire any further into Respondent's claim requires an inquiry into matters not apparent from the face of the record. Yet, the Fourth District, in their opinion in this case, reversed and remanded for consideration of "whether the trial court would have imposed the same 1995 guidelines departure

sentence under the 1994 guidelines." Consideration of this issue could require an evidentiary determination, an evidentiary determination which is not appropriate in a Fla. R. Civ. P. 3.800(a) proceeding. It is clear that the Fourth District should have affirmed the denial of the motion because, under their analysis, the resolution of the issue in question would almost certainly require an evidentiary determination in order to resolve it.

The State reiterates once more that since Respondent was sentenced to an upward departure, the constitutionality, or lack thereof, of the 1995 amendments to the guidelines did not prejudice Respondent in any way as the same upward departure sentence could also have been lawfully and permissibly imposed even if a 1994 guidelines scoresheet had been prepared instead of a 1995 guideline scoresheet. Moreover, because this was a proceeding involving a motion to correct illegal sentence, the inquiry should have ended here and the appellate court should not have remanded for consideration of an issue which essentially requires an evidentiary determination. Accordingly, this Court must quash that portion of the Fourth District's opinion which purports to reverse part of the trial court's order denying the motion to correct illegal sentence.

CONCLUSION

WHEREFORE, based on the foregoing arguments and the authorities cited therein, Petitioner respectfully requests this Court QUASH the decision of the district court insofar as it reverses the decision of the trial court denying the motion to correct illegal sentence in the instant case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing "Petitioner's Brief on the Merits," has been furnished by U.S. Mail to Gwenda Jean Lemon, D.C.# 657732, Dade Correctional Institution, 19000 S.W. 377th Street, Suite 2000, Florida City, FL 33034, on August __, 2001.

_____
Of Counsel

CERTIFICATE OF COMPLIANCE WITH FONT STANDARDS

I HEREBY CERTIFY that a true and correct copy of the foregoing "Petitioner's Brief on the Merits" has, in accordance with Rule 9.210 of the Florida Rules of Appellate Procedure, been prepared with 12 point Courier New type.

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Of Counsel

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APPENDIX