

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC00-402

ANDREW BUSBY,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

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

BRIEF OF RESPONDENT ON MERITS

ROBERT A. BUTTERWORTH

Attorney General
Tallahassee, Florida

CELIA TERENZIO

Assistant Attorney General
Bureau Chief, West Palm Beach
Florida Bar No. 656879

STEVEN R. PARRISH

Assistant Attorney General
Florida Bar No. 0185698
1655 Palm Beach Lakes Boulevard
Suite 300
West Palm Beach, FL 33401-2299
Telephone: (561) 688-7759

Counsel for Respondent

CERTIFICATE OF INTERESTED PERSONS

Counsel for the State of Florida, Appellee herein, certifies that the following additional persons and entities have or may have an interest in the outcome of this case.

1. The Honorable William P. Dimitrouleas, Circuit Court Judge, Seventeenth Judicial Circuit
2. The Honorable Robert A. Butterworth, Attorney General
3. Celia A. Terenzio, Assistant Attorney General, Bureau Chief (Counsel for the State of Florida, Respondent)
4. Steven R. Parrish, Assistant Attorney General (Counsel for the State of Florida, Respondent)
5. The Honorable Michael Satz, State Attorney Nineteenth Judicial Circuit
6. The Honorable Richard L. Jorandby, Public Defender Fifteenth Judicial Circuit (Counsel for Petitioner/Appellant)
7. Joseph R. Chloupek, Assistant Public Defender (Counsel for Petitioner/Appellant)
8. Andrew Buby (Petitioner/Appellant/Defendant)

CERTIFICATE OF TYPE SIZE AND STYLE

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 the State of Florida, Appellee herein, hereby certifies that the instant brief has been prepared with 12 point Courier New type, a font that is not spaced proportionately.

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PRELIMINARY STATEMENT

Petitioner was the defendant in the trial court and Appellant before the Fourth District Court of Appeal, and will be referred to herein as "Petitioner" or "Defendant" or "Appellant". Respondent, the State of Florida, was the prosecution in the trial court and the Appellee on appeal, and will be referred to herein as "Respondent" or the "State". An Appendix is attached consisting of (A-1), a copy of Salters v. State, Case No. SC94633, and (A-2), a copy of Heggs v. State (Case No. SC93851, May 4, 2000). References to the attached Appendix will be by symbol "A-" followed by the number of the document and associated page number within the document.

The following symbols will also be used:

"R" = Record on Appeal

"T" = Transcript on Appeal

STATEMENT OF THE CASE AND FACTS

Petitioner was charged with six crimes committed on December 13, 1996, and was convicted of them all by a jury. Respectively, they were Felony Causing Bodily Injury, Attempted Murder in the Second Degree, Armed Burglary of a Structure with a Dangerous Weapon, Armed Robbery with a Deadly Weapon, Dealing in Stolen Property, and Grand Theft of a Motor Vehicle (R 7-8; R 41-46; T 675-76). Petitioner had a sentencing score of 198.52 - 230.87 months (R 54-55). The trial court found Petitioner to have committed two prior robberies and one prior aggravated battery, with the last conviction having occurred within five years of the instant offenses. The trial court found Petitioner to be a violent career criminal on counts 1-4, and an habitual violent offender on counts 5 and 6 (R 55; T 710-11). Petitioner was sentenced to life on each of counts 1-4, 30 years with a mandatory minimum of 10 years on count 5, and 10 years with a 5 year mandatory minimum on count 6 (R 60-77; T 711-12).

On direct appeal to the 4th DCA, Petitioner challenged the application of Chapter 95-182, Laws of Florida (1995) to his sentencing, arguing it violated the single subject requirement of the Florida constitution. The 4th DCA rejected Petitioner's standing to challenge, arguing he was not within the window period

to have standing, citing Salters v. State, 731 So.2d 826 (Fla. 4th DCA), rev. granted, No. 95,663 (Fla. Dec. 3, 1999). The window closed on October 1, 1996 according to Salters, and Petitioner's crimes were committed on December 13, 1996, outside that window. The 4th DCA certified conflict with Thompson v. State, 708 So.2d 315, 317 n.1 (Fla. 2d DCA 1998), reversed, 1999 WL 1244518 (Fla. Dec. 22, 1999)[25 Fla.L.Weekly S1, Fla. December 22, 1999], as to the window period for the single subject matter constitutional challenge to §775.084(1)(c), Florida Statutes (1997). Johnson v. State, 25 Fla.L.Weekly D587 (Fla. 4th DCA, March 8, 2000).

On May 11, 2000, this Court made its ruling on Salters. "[W]e hold that the window period for challenging the violent career criminal sentencing provisions created by chapter 95-182, Laws of Florida, opened on October 1, 1995, when chapter 95-182 became effective, and closed on May 24, 1997, when chapter 97-97, Laws of Florida, reenacted the amendments contained in chapter 95-182 as part of the biennial adoption process." Salters v. State, Case No. SC95663, May 11, 2000 (A-1). Since Petitioner committed his crimes on December 13, 1996, his challenge is within the window.

In Heggs v. State, Case No. SC93851, May 4, 2000 (A-2), this Court stated that "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." (Citations omitted). Had Petitioner been sentenced under the 1994 guidelines, he could still have received the same sentences he received under the 1995 sentencing guidelines, without departure. §775.084(4)(b)(2) and (3); §775.084(4)(c)(1)(1995).

SUMMARY OF THE ARGUMENT

This Court should uphold the sentence of the trial court despite the fact Petitioner has standing to challenge the 1995 sentencing guidelines, because his sentence is within the 1994 sentencing guidelines. Thus, Petitioner is not entitled to any sentencing relief.

ARGUMENT

PETITIONER HAS STANDING TO CHALLENGE THE 1995 SENTENCING GUIDELINES PURSUANT TO SALTERS V. STATE, CASE NO. SC95663, MAY 11, 2000, BUT PETITIONER IS NOT ENTITLED TO SENTENCING RELIEF SINCE HIS SENTENCE FALLS WITHIN THE 1994 SENTENCING GUIDELINES.

Petitioner asserts that he has standing to challenge the 1995 sentencing guidelines contained in Chapter 95-182. In light of this Court's ruling in Salters v. State, Case No. SC95663, May 11, 2000, Respondent concedes Petitioner's standing to challenge chapter 95-182 on single subject requirement grounds.

In the instant case, Petitioner is not owed any sentencing relief despite his standing to challenge Chapter 95-182, because he has not been adversely affected by the 1995 amendments. This Court has issued its revised opinion in Heggs v. State (Case No. SC93851, May 4, 2000). This Court held:

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. See, e.g., Freeman v. State, 616 So.2d 155, 156 (Fla. 1st DCA 1993)(affirming denial of the defendant's motion to correct sentence, even in light of this Court's decision in State v. Johnson, 616 So.2d 1 (Fla. 1993), because the defendant failed to allege that "he could not have been habitualized without the amendments effected

by chapter 89-280"); cf. State v. Mackey, 719 So.2d 284, 284-85 (Fla. 1998), (affirming fifteen-year sentence that departed from 1991 guidelines - even though the trial court should have calculated the sentence using the 1994 guidelines - because the fifteen-year sentence would have been within the 1994 guidelines range).

Heggs v. State, Case No. SC93851, May 4, 2000 at 13-14. (A-1 at 13-14).

Petitioner was convicted of Felony Causing Bodily Injury, Attempted Murder in the Second Degree, Armed Burglary of a Structure with a Dangerous Weapon, Armed Robbery with a Deadly Weapon, Dealing in Stolen Property, and Grand Theft of a Motor Vehicle. The trial court found Petitioner to have committed two prior robberies and one prior aggravated battery, with the last conviction having occurred within five years of the instant offenses. The trial court further found Petitioner to be a violent career criminal on counts 1-4, and an habitual violent offender on counts 5 and 6.

Petitioner was sentenced, pursuant to §775.084(4)(c)(1), and §775.084(4)(b)(2) and (3) of the 1995 sentencing guidelines, to life on each of counts 1-4, 30 years with a mandatory minimum of 10 years on count 5, and 10 years with a 5 year mandatory minimum on count 6 - all to be served concurrently. This identical sentence is available under §775.084(4)(b)(2) and (3), and §775.084(4)(c)(1)

of the 1994 sentencing guidelines. Since the sentence imposed under the 1995 guidelines could have been imposed under the 1994 guidelines (without a departure), Petitioner is not entitled to relief under the Heggs decision.

CONCLUSION

Wherefore, based on the foregoing arguments and the authorities cited therein, this Court should uphold Petitioner's sentence.

Respectfully submitted,

ROBERT A. BUTTERWORTH
Attorney General
Tallahassee, Florida

CELIA TERENCE
Assistant Attorney General, Bureau Chief
Florida Bar No. 656879

STEVEN R. PARRISH
Assistant Attorney General
Florida Bar No. 0185698
1655 Palm Beach Lakes Boulevard,
Suite 300
West Palm Beach, FL 33401-2299
(561) 688-7759

Counsel for Appellee

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing "Brief of Respondent on Merits" has been furnished by U.S. Mail, to: JOSEPH R. CHLOUPEK, Public Defender, 15th Judicial Circuit of Florida, Criminal Justice Building/6th Floor, 421 3rd Street, West Palm Beach, Florida 33401 on May _____, 2000.

CELIA TERENZIO
Assistant Attorney General, Bureau Chief

STEVEN R. PARRISH
Assistant Attorney General