IN THE SUPREME COURT OF FLORIDA

CASE NO. SC00-554

CLIFTON JOHNSON,

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

CASE NO. SC00-554

CLIFTON JOHNSON v. STATE OF FLORIDA

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 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 Fifthteenth Judicial Circuit (Counsel for Petitioner/Appellant)

7. Joseph R. Chloupek, Assistant Public Defender (Counsel for Petitioner/Appellant)

8. Clifton Johnson (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.

TABLE OF CONTENTS

CERTIFICATE OF INTERESTED PERSONS i

CERTIFICATE OF TYPE SIZE AND STYLE ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

PRELIMINARY STATEMENT 1

STATEMENT OF THE CASE AND FACTS 2

SUMMARY OF THE ARGUMENT 4

ARGUMENT 5

PETITIONER HAS NO STANDING TO CHALLENGE THE 1995 SENTENCING GUIDELINES PURSUANT TO SALTERS V. STATE, 731 SO.2D 826 (FLA. 4TH DCA, 2000), AND EVEN ASSUMING STANDING, PETITIONER WOULD NOT BE ENTITLED TO RELIEF SINCE HIS SENTENCE FALLS WITHIN THE 1994 SENTENCING GUIDELINES.

. 5

CONCLUSION 7

CERTIFICATE OF SERVICE 8

TABLE OF AUTHORITIES

STATE CASES

Freeman v. State, 616 So. 2d 155 (Fla. 1st DCA 1993) 6

Heggs v. State (Case No. SC93851, May 4, 2000) 1, 6

Johnson v. State, 25 Fla.L.Weekly D587 (Fla. 4th DCA, March 8, 2000) 2

Salters v. State, 731 So. 2d 826 (Fla. 4th DCA), rev. granted, No. 95,663 (Fla. Dec. 3, 1999) 2, 5

State v. Mackey, 719 So. 2d 284 (Fla. 1998), ... 6

State v. Thompson, 25 Fla.L.Weekly S1, S4 n.4 (Fla.. December 22, 1999) 6

Thompson v. State, 708 So. 2d 315 (Fla. 2d DCA 1998), reversed, 1999 WL 1244518 (Fla. Dec. 22, 1999) 2, 5

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 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 convicted by a jury of aggravated battery with a deadly weapon and attempted strong arm robbery after a jury trial (R 17-18). These crimes were committed on November 1, 1996. Petitioner's sentencing guidelines scoresheet reflected a permitted range of 52.65 to 87.75 months imprisonment, but he was sentenced as a violent habitual offender, to 25 years with a 10 year mandatory minimum on the aggravated battery with a deadly weapon, and 10 years with a 5 year minimum mandatory on the attempted strong arm robbery, to be served concurrently (T 415-16; R 54-61).

Petitioner's direct appeal to the 4th DCA was per curiam affirmed, citing Salters v. State, 731 So.2d 826 (Fla. 4th DCA), rev. granted, No. 95,663 (Fla. Dec. 3, 1999). 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).

In Heggs v. State, Case No. SC93851, May 4, 2000, 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 a sentence to 25 years prison, including a 10 year mandatory minimum, as an habitual violent felony offender on Count I, and 10 years prison, including a 5 year mandatory minimum, also as an habitual violent felony offender on Count II, to run concurrently. §775.084(4)(b)(2) and (3)(1995).

SUMMARY OF THE ARGUMENT

This Court should uphold the sentence of the trial court, as Petitioner has no standing to raise the single subject requirement argument against the 1995 sentencing guidelines. Further, should this Court find Petitioner does have standing, his sentence is well within the 1994 sentencing guidelines. Thus, Petitioner is not entitled to any sentencing relief.

ARGUMENT

PETITIONER HAS NO STANDING TO CHALLENGE THE 1995 SENTENCING GUIDELINES PURSUANT TO SALTERS V. STATE, 731 SO.2D 826 (FLA. 4TH DCA, 2000), AND EVEN ASSUMING STANDING, PETITIONER WOULD NOT BE ENTITLED TO 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, taking advantage of the time window delineated by the Second District Court of Appeals in Thompson v. State, 708 So.2d 315, 317 n.1 (Fla. 2d DCA 1998) - opening October 1, 1995 and closing on May 24, 1997, the date the chapter was reenacted as part of the Legislature's biennial adoption of the Florida Statutes. Since the offenses in this case occurred on November 1, 1996, the State concedes Petitioner would have standing to challenge if Thompson was controlling.

The 4th DCA uses the window set forth in Salters v. State, 731 So.2d 826 (Fla. 4th DCA 1999) review granted, No. 95,663 (Fla. December 13, 1999) - opening October 1, 1995 and closing on October 1, 1996. Utilizing the Salters window, Petitioner would not have standing to challenge. Since Petitioner's case falls under the jurisdiction of the 4th DCA, he falls outside the applicable window to challenge.

This Court has yet to rule on its review of Salters, and did not resolve the difference in time windows between the 2d and 4th DCAs when it decided Thompson. See State v. Thompson, 25 Fla.L.Weekly S1, S4 n.4 (Fla. December 22, 1999). Consequently, the standing dispute will be decided upon the Salters review and decision.

In the instant case, Petitioner is not owed any sentencing relief even should this Court rule he has 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)(A-1). 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 aggravated battery, a second degree felony, and attempted strong armed robbery, a third degree felony. The trial court found Petitioner to be an habitual violent offender as he had previously been convicted on March 9, 1994 of robbery; placed on probation for possession of cocaine on February 6, 1996; and, convicted of possession of cocaine on March 8, 1996 (R 52-53). The 1994 robbery qualified Petitioner for treatment as an habitual violent felony offender under either the 1994 or 1995 sentencing guidelines. Under either guideline, Petitioner was eligible to receive a sentence not exceeding 30 years, with a 10-year mandatory minimum on Count I, and a sentence not exceeding 10 years, with a 5-year mandatory minimum on Count II. The sentence Petitioner received was within both sets of guidelines.

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 TERENZIO
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 9, 2000.

CELIA TERENZIO
Assistant Attorney General, Bureau Chief

STEVEN R. PARRISH
Assistant Attorney General