IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO. SC01-1600
(4th DCA Case No. 4D01-202)

STATE OF FLORIDA,

Petitioner,

vs.

ADRIAN DAVIS,

Respondent.

PETITIONER'S INITIAL BRIEF ON THE MERITS

ROBERT A. BUTTERWORTH
Attorney General
Tallahassee, Florida

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

DANIEL P. HYNDMAN
Assistant Attorney General
Florida Bar No. 0814113
1655 Palm Beach Lakes Boulevard
Suite 300
West Palm Beach, Florida 33401
Telephone: (561) 688-7759

Counsel for Petitioner

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

FLORIDA CONSTITUTION

LAWS OF FLORIDA

FLORIDA STATUTES

PRELIMINARY STATEMENT

Respondent was the movant and Petitioner was the respondent in the Criminal Division of the Circuit Court of the Fiftennth Judicial Circuit, in and for Palm Beach County, Florida. Petitioner was the Appellant and Respondent 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.

STATEMENT OF THE CASE AND FACTS

On July 7, 1998, the Respondent, Adrian Davis, was found guilty of one count of attempted second degree murder and one count of shooting into an occupied vehicle[1] (Transcript 345). After a sentencing hearing which immediately followed the verdict, the trial court sentenced the Respondent to a 1995 guidelines sentence of 10 years prison (Transcript 365-368). Thereafter the Respondent was advised by the trial court that if he entered a plea of guilty to the instant case, a single count of grand theft of a motor vehicle committed on April 30, 1997, that he would be sentenced to the statutory maximum for that offence - five years - and that his sentence would run concurrent with his ten year sentence in the attempted second degree murder case (Transcript 371-372). After considering the trial court's offer the Respondent pled guilty and was sentenced, as promised, to five years prison on the instant case (Transcript 372-376).

On August 7, 2000, upon the Respondent's Motion to Correct Illegal Sentence, the trial court entered an Amended Sentence in L.T. case # 97-5779 CF A02, slightly reducing the Respondent's ten year sentence to 9.71 years (116.5 months) under the

---

[1] L.T. case # 97-5779CF A02. All quotations from the plea and sentencing in the instant case are from the transcript of case# 97-5779CF A02.

authority of Heggs v. State, 759 So. 2d 620 (Fla. 2000). The trial court noted in its Amended Sentence that the Respondent's original sentence of ten years would have constituted a departure under the 1994 guidelines. The entry of this Amended Sentence was appealed by the Respondent and is currently under review by the Fourth District Court of Appeal ("Fourth District") (case # 4D00-4059).

On September 5, 2000, the Respondent filed a Motion to Correct Illegal Sentence claiming that his five year sentence in the instant case was in violation of this Court's decision in Heggs. In its response filed December 19, 2000, the State argued that although the instant offence fell within the window period provided by Heggs, the Respondent was not entitled to relief because the five year sentence was not imposed under the 1995 guidelines, but, rather, was an upward aggravated departure sentence. On January 4, 2001, the trial court denied the Respondent's motion.

The Respondent then filed a appeal with the Fourth District. On May 2, 2001, that court reversed the decision of the trial court and remanded for a determination of whether it could be shown that the trial court would have imposed the same 1995 guideline departure sentence under the 1994 guidelines; in so ruling the Fourth District substantially relied on its decision

in Lemon v. State, 769 So. 2d 417 (Fla. 4th DCA 2000)[2]. Davis v. State, 26 Fla. L. Weekly D1134 (Fla. 4th DCA May 2, 2001). On July 11, 2001, the Fourth District granted the Petitioner's Motion for Certification of Conflict with the decisions of the Second District Court of Appeal ("Second District") in Ray v. State, 772 So. 2d 18 (Fla. 2d DCA 2000) and Kwil v. State, 768 So. 2d 502 (Fla. 2d DCA 2000). Davis v. State, Opinion on Certification of Conflict, 26 Fla. L. Weekly D1694 (Fla. 4th DCA July 11, 2001). On August 3, 2001, the Fourth District granted the petitioner's motion to stay issuance of mandate pending review by this Court.

[2] This Court has accepted jurisdiction to review Lemon. Case # SC00-2549.

SUMMARY OF THE ARGUMENT

The Fourth District erroneously reversed the order of the trial court denying the Respondent's motion to correct illegal sentence. The Respondent was not entitled to relief under Heggs because, as a recipient of an upward departure sentence, he was not adversely affected by the amendments to the 1994 guidelines made by chapter 95-184. The standard announced by the Fourth District in the instant case, and in Lemon, that a defendant is entitled to be re-sentenced under Heggs unless it can be shown that he *would* (rather than *could*) receive the same sentence under the 1994 guidelines, inverts the limitation established in Heggs and is contrary to that decision. The decision of the Fourth District should be reversed.

ARGUMENT

THE RESPONDENT IS NOT ENTITLED TO RELIEF UNDER THIS COURT'S DECISION IN HEGGS V. STATE; THE RESPONDENT WAS NOT ADVERSELY AFFECTED BY THE AMENDMENTS MADE BY CHAPTER 95-184

In the Heggs decision this Court held that chapter 95-184, laws of Florida, violated the single subject rule of article III, section 6 of the Florida Constitution. Id. at 627. The defendant (Heggs), whose sentence was calculated based on the 1995 sentencing guidelines - - which were actually the 1994 guidelines as amended by chapter 95-184 - - was directed to be re-sentenced under the original 1994 guidelines. Id. at 621-622, 630-631. This Court realized that its decision would require the re-sentencing of number of persons sentenced under the 1995 guidelines and accordingly held that "only those persons adversely affected by the amendments made to chapter 95-184 may rely on our decision here to obtain relief." Id. at 627. Since the Respondent in the instant case was not adversely affected by chapter 95-184, he is not entitled to relief under Heggs.

Although chapter 95-184 amended the 1994 sentencing guidelines the Respondent did not receive a guideline sentence in the instant case. By agreement of the parties, the Respondent was given an upward departure sentence based on aggravating circumstances. See section 921.0015(3)(a), Fla.

Stat. (1997). After the Respondent was convicted of attempted second degree murder and sentenced to ten years prison, the trial court advised him that if he pled guilty in the instant case he would be sentenced to five years prison concurrent with the other sentence:

> THE COURT: . . .if you plead guilty to this, this is a five-year felony, which is the maximum I would adjudge you guilty and sentence you to the same five years running concurrent with the other case, the ten year case, with again with whatever credit, running it all together.

(Transcript 371-372). The Respondent accepted the trial court's offer and was sentenced accordingly (Transcript 372-377).

Although the Respondent was sentenced, by agreement, to an upward departure sentence, the Fourth District remanded for "a determination of whether it can be shown that the trial court would have imposed the same 1995 guidelines departure sentence under the 1994 guidelines" and if "such showing cannot be made, then resentencing is required under *Heggs* . . ." Davis, 26 Fla. L. Weekly at D1134. This holding is contrary to Heggs; only those defendants adversely affected by chapter 95-184's amendments to the 1995 guidelines may obtain relief under that decision. Id. at 627. Since the Respondent was not sentenced pursuant to the 1995 guidelines, he may not seek relief under Heggs.

The Fourth District's decision in the instant case follows its decision in Lemon, which is likewise contrary to Heggs. In Lemon, the Fourth District remanded the defendant's case for re-sentencing although she was given a upward departure sentence; the court rejected the state's argument that the defendant could have received the same departure sentence regardless of whether the 1994 or 1995 guideline scoresheets were used. Id. at 417-418. The Fourth District instead applied a standard which requires a demonstration that the departure sentence actually imposed on a defendant *would* have been imposed under the 1994 guidelines rather than *could* have been imposed in order to avoid re-sentencing under Heggs. Lemon, 769 So. 2d at 417. Davis, 26 Fla. L. Weekly D1694-1695. This holding is incorrect for two reasons:

1. it extends Heggs relief to those defendants not adversely effected by the amendments made by chapter 95-184; and

2. it considers departure sentences as arising from the guidelines.

This Court clearly intended to limit relief to those defendants who could demonstrate that their sentence would been different if imposed under the 1994 guidelines. Heggs, 759 So. 2d at 627. Stated another way: a defendant may not obtain relief under Heggs if the sentence received under the 1995 guidelines

could have been imposed under the 1994 guidelines. However, the Fourth District has inverted this limitation by requiring a showing that a sentence imposed under the 1995 guidelines *would* (rather than *could*) have been imposed under the 1994 guidelines in order to avoid re-sentencing under Heggs; this is directly contrary to Heggs. Additionally, the Fourth District appears to overlook the point that a departure sentence is, by definition, separate and independent from a guideline sentence and is limited only by the applicable maximum sentence provided in section 775.082. Section 921.0016 (1)(e), Florida Statutes.

The Second District correctly applied Heggs in its decisions in Ray v. State, 772 So. 2d 18 (Fla. 2d DCA 2000) and Kwil v. State, 768 So. 2d 502 (Fla. 2d DCA 2000). In Ray, the court held that the defendant was not entitled to be re-sentenced under Heggs because he was a given a departure sentence based on statutory aggravating factors which were equally valid under the 1994 and 1995 guidelines; therefore he was not adversely effected by the amendments made by chapter 95-184. Id. A similar conclusion was reached in Kwil. Likewise, in the instant case, the Respondent was given an upward departure sentence (the statutory maximum); naturally, this sentence was completely unaffected by the amendments made by chapter 95-184. Consequently, the Respondent was not “adversely effected” by

these amendments and should not be re-sentenced. Heggs, 759 So. 2d at 627.

The Fourth District has previously held that a defendant sentenced as a habitual felony offender is not entitled to be re-sentenced under Heggs because "a habitual offender sentence is not subject to the guidelines provisions of section 921.001." Arce v. State, 762 So. 2d 1003 (Fla. 4th DCA 2000). See also, Abaunza v. State, 781 So. 2d 486 (Fla. 4th DCA 2001). An upward departure sentence is likewise not bound by these provisions; therefore, had the Fourth District ruled in a manner consistent with their previous cases, the Respondent would not have been granted relief here. The Fourth District has also previously held that defendants, like the Respondent, who enter a plea which is not contingent on a guideline sentence, are not entitled to relief under Heggs. See Brown v. State, 26 Fla. L. Weekly D787 (Fla. 4th DCA 2001); McCray v. State, 769 So. 2d 1126 (Fla. 4th DCA 2000). See also, Dunenas v. Moore, 762 So. 2d 1007 (Fla. 3d DCA 2000).

Since the Respondent was sentenced to an upward departure sentence, a sentence beyond the guidelines, he was not adversely affected by the amendments made by chapter 95-184. The Fourth District's rule announced in the instant case and in Lemon, that in order to avoid re-sentencing under Heggs it must be shown

that a defendant *would* – rather than *could* – receive the actual sentence imposed if the 1994 guidelines were used, inverts the limitation of Heggs. Clearly, the Respondent in the instant case *could* have received the same upward departure sentence regardless of whether the 1994 or 1995 guidelines were employed. Consequently, he should not be entitled to re-sentencing and the opinion of the lower court should be reversed.

CONCLUSION

WHEREFORE, based on the foregoing arguments and the authorities cited therein, Petitioner respectfully requests this Court REVERSE the decision of the Fourth District Court of Appeal.

Respectfully submitted,

ROBERT A. BUTTERWORTH
Attorney General
Tallahassee, Florida

_____
CELIA TERENZIO
Assistant Attorney General
Bureau Chief

_____
DANIEL P. HYNDMAN
Assistant Attorney General
Florida Bar No. 0814113
1655 Palm Beach Lakes Boulevard
Suite 300
West Palm Beach, FL 33401-2299
(561) 688-7759
Counsel for Petitioner

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 Adrian Davis, D.C.# 197739, Glades Correctional Institution, 500 Orange Avenue Circle, Belle Glade, FL 33430, 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 Initial 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.

_____
Of Counsel