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THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO. SC01-2456
(4th DCA Case No. **4D01-1861)**

STATE OF FLORIDA,

Petitioner,

vs.

JIMMY LEE ROSS,

Respondent.

PETITIONER'S SECOND AMENDED BRIEF ON JURISDICTION

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STATEMENT OF THE CASE AND FACTS

Respondent, Jimmy Lee Ross, filed a motion to correct sentence arguing that, pursuant to this Court's decision in Heggs v. State, 759 So.2d 620 (Fla. 2000), he was entitled to resentencing under the 1994 guidelines in his underlying case.(A) After the trial court denied his motion, Respondent filed an appeal of the trial court's order in the Fourth District Court of Appeal.

The Fourth District issued an opinion, Ross v. State, (Fla. 4th DCA 2000), in which it noted that the 1995 guidelines were used to calculate the scoresheet and that Ross was given an upward departure sentence. Petitioner had argued that Respondent was not entitled to relief because the same upward departure sentence could have been imposed even if the 1994 guidelines had been used to calculate the scoresheet.

The Fourth District then admitted that relief might not be due where it could 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, 25 Fla. L. Weekly D1972 (Fla. 2d DCA August 16, 2000).

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). The Respondent accepted the trial court's offer and was sentenced

accordingly.

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,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing "Petitioner's Second Amended Brief on Jurisdiction," has been furnished by U.S. Mail, postage prepaid, to Jimmy Lee Ross, D.C.#062496, 500 Orange Avenue Circle, Belle Glade, Florida 33430-5221 on this 26th day of April 2002.

Donna Hoffman
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.

Donna Hoffman
Of Counsel

N-BK

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT JULY TERM 2001

JIMMY LEE ROSS,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

CASE NO. 4D01-1543

Opinion filed September 5, 2001

Appeal of order denying rule 3.800(a) motion from the Circuit Court for the Seventeenth Judicial Circuit, Broward County; Ana I. Gardiner, Judge; L.T. Case No. 96-3548 CF10.

Jimmy Lee Ross, Belle Glade, pro se.

Robert A. Butterworth, Attorney General, Tallahassee, and Judy Hyman, Assistant Attorney General, West Palm Beach, for appellee.

PER CURIAM.

Appellant, Jimmy Lee Ross, appeals the trial court's order denying his motion to correct illegal sentence filed pursuant to Florida Rule of Criminal Procedure 3.800(a). We affirm in part, reverse in part, and remand.

Appellant pled guilty to aggravated battery and possession of a firearm by a convicted felon, and was sentenced to 15 years in prison for the aggravated battery and 10 years for the possession of a firearm. In his motion, appellant raised the following challenges: (1) use of a 1995 sentencing guidelines scoresheet based on *Heggs v. State*, 759 So. 2d 620 (Fla. 2000); (2) consecutive sentencing for two offenses which occurred during a single criminal episode; (3) violation of double jeopardy in separate convictions; and (4) illegal reasons given for departure from the sentencing guidelines.

We reverse the trial court's summary denial of relief on ground one since the trial court denied relief without consideration of a 1994 sentencing guidelines scoresheet. Appellant is entitled to consideration of his sentence under the 1994 scoresheet. However, if it can be shown that the trial court would have imposed the same guidelines departure under the 1994 scoresheet, then appellant may not be entitled to sentencing relief. *See Lemon v. State*, 769 So. 2d 417 (Fla. 4th DCA 2000).

We affirm the trial court's summary denial of appellant's challenges in grounds two, three and four of the motion. Appellant's consecutive sentences for two separate crimes were legal under section 775.021(4), Florida Statutes. Likewise, his double jeopardy challenge to his separate convictions is without merit. *See Montgomery v. State*, 704 So. 2d 548 (Fla. 1st DCA 1997). His challenge to the legality of the reasons for the original guidelines departure is not appropriate for rule 3.800(a), and would be time-barred if his motion were considered under Florida Rule of Criminal Procedure 3.850.

We, therefore, reverse and remand for further consideration of appellant's *Heggs* challenge based on a 1994 guidelines scoresheet, but affirm as to the remainder of the trial court's order.

FARMER, STEVENSON and TAYLOR, JJ., concur.

NOT FINAL UNTIL THE DISPOSITION OF ANY TIMELY FILED MOTION FOR REHEARING.