IN THE SUPREME COURT OF FLORIDA

WINYATTA BUTLER,

Petitioner,

v. CASE NO. SC01-2465

STATE OF FLORIDA,

Respondent.

_____/

ON DISCRETIONARY REVIEW FROM THE
FIFTH DISTRICT COURT OF APPEAL

RESPONDENT'S BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

Respondent generally agrees with the statement of the case and facts as provided by Petitioner, but would supplement them with the following:

Butler entered guilty pleas to possession of cocaine, possession of less than twenty grams of cannabis, driving while license suspended or revoked, resisting arrest without violence and DUI; offenses which were committed on October 17, 1998. Butler v. State, 774 So. 2d 925, 926 (Fla. 5th DCA 2001). He was sentenced on March 16, 1999, to a total of 75.6 months imprisonment for these offenses. Id. On direct appeal, Butler's judgment and sentence were *per curiam* affirmed on December 10, 1999. Butler v. State, 745 So. 2d 558 (Fla. 5th DCA 1999).

Before Butler's conviction was final, he filed a Florida Rule of Criminal Procedure 3.850 Motion for Post-conviction Relief raising two grounds for relief. He argued that his sentence of 75.6 months was illegal because it exceeded the statutory maximum for a third degree felony of five years. Butler, 774 So. 2d at 926. Additionally, he argued that the trial court sentenced him in violation of the plea agreement without affording him the opportunity to withdraw the plea. Id.

The Fifth District Court of Appeal (DCA), in its opinion affirming the trial court's order denying post-conviction relief, noted that Butler had been advised during his plea colloquy that his sentence could exceed the statutory maximum for a third degree felony as his guidelines range was 6 to 12 years. Id. Thus, there was no violation of the plea agreement. Id.

The DCA also found the Criminal Punishment Code (the Code) applied based upon the offense dates and pursuant to the Code a sentencing court is permitted to impose a sentence up to the statutory maximum for any offense. Id. at 927. However, as this Court noted in Maddox v. State, 760 So. 2d 89 (Fla. 2000), the Code also requires a trial court to impose a guidelines sentence which exceeds the statutory maximum where a defendant's score is greater than the statutory maximum. Id. Accordingly, the DCA sustained the trial court's denial of relief and, finding a conflict between these two provisions of the Code, certified the following question to this Court: "May a trial court sentence a defendant to a term in excess of the statutory maximum for an offense committed after October 1, 1998, where the lowest possible sentence under the code exceeds the statutory maximum?" Id.

This Court has postponed a decision on jurisdiction pursuant

to an order issued on February 13, 2002.

SUMMARY OF ARGUMENTS

POINT I: The Fifth District Court of Appeal certified a question to this Court upon finding a conflict between section 921.002(1)(g), Florida Statutes and section 921.0024(2), Florida Statutes, of the Criminal Punishment Code. This Court should not accept jurisdiction in this cause as there is no conflict between section 921.002(1)(g) and section 921.0024(2). Moreover, it is a well established principle of statutory interpretation that courts are required to interpret related statutes so that they harmonize with each other. These two provisions can be interpreted so that they harmonize with each other since the former applies generally to all sentencing while the latter applies only in those unique circumstances wherein the guidelines total exceeds the statutory maximum. Since there is no conflict and the provisions can be interpreted so that they harmonize with each other, this Court should not accept jurisdiction and should allow the Fifth District Court of Appeal's decision denying relief to Butler to stand. For the same reasons, if this Court should accept jurisdiction, the certified question should be answered in the affirmative.

POINT II: This claim was never addressed in the Fifth District Court of Appeals, and, thus, was not preserved for review before this Court. Regardless, section 921.0024(2), Florida Statutes,

gives persons of ordinary intelligence adequate notice of the proscribed conduct and, thus, is not unconstitutionally vague.

ARGUMENTS

POINT I

AS THERE IS NO CONFLICT BETWEEN THESE PROVISIONS, THIS COURT SHOULD NOT ACCEPT JURISDICTION AND THE FIFTH DISTRICT COURT OF APPEAL'S OPINION SUSTAINING THE TRIAL COURT'S DENIAL OF RELIEF SHOULD STAND.

The Fifth District Court of Appeal (DCA) certified a question to this Court[1] regarding an alleged conflict between two provisions of the Criminal Punishment Code, hereinafter "the Code." Butler v. State, 774 So. 2d 925, 927 (Fla. 5th DCA 2001). However, as there is no conflict between these provisions as will be established herein, this Court should not accept jurisdiction and should let stand the DCA's decision sustaining the trial court's denial of relief.

It is well settled that "judicial interpretation of Florida statutes is a purely legal matter and therefore subject to de novo review." Racetrac Petroleum, Inc. v. Delco Oil, Inc., 721 So. 2d 376, 377 (Fla. 5th DCA 1998); see also Dixon v. City of

[1] "May a trial court sentence a defendant to a term in excess of the statutory maximum for an offense committed after October 1, 1998, where the lowest possible sentence under the code exceeds the statutory maximum?" Id.

Jacksonville, 774 So. 2d 763, 765 (Fla. 1st DCA 2000) ("It is well established that the construction of statutes, ordinances, contracts, or other written instruments is a question of law that is reviewable de novo, unless their meaning is ambiguous."), rev. granted, 814 So. 2d 438 (Fla. 2002).

Moreover, it is a well established principle of statutory interpretation that courts are required to interpret related statutes so that they harmonize with each other. See, e.g., Carawan v. State, 515 So. 2d 161, 168 (Fla. 1987) ("The courts' obligation is to adopt an interpretation that harmonizes two related statutory provisions while giving effect to both."). This follows the general rule that the legislature does not intend "to enact purposeless and therefore useless, legislation." Sharer v. Hotel Corp. of America, 144 So. 2d 813, 817 (Fla. 1962).

The facts of the underlying case are not in dispute. Before Butler's conviction was final, he filed a Florida Rule of Criminal Procedure 3.850 Motion for Post-conviction Relief raising two grounds for relief. He argued that his sentence of 75.6 months was illegal because it exceeded the statutory maximum for a third degree felony of five years[2]. Additionally,

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[2]See § 775.082(3)(d), Florida Statutes (2000)("A person who has been convicted of any other designated felony may be punished...[f]or a felony of the third degree, by a term of

he argued that the trial court sentenced him in violation of the plea agreement without affording him the opportunity to withdraw the plea.

The DCA, in its opinion affirming the trial court's order denying post-conviction relief, noted Butler had been advised during his plea colloquy that his sentence could exceed the statutory maximum for a third degree felony as his guidelines range was 6 to 12 years. Butler v. State, 774 So. 2d at 926. Thus, there was no violation of the plea agreement. Id.

The DCA also found the Code applied based upon the offense dates, and pursuant to the Code, a sentencing court is permitted to impose a sentence up to the statutory maximum for any offense. Id. at 927. However, as this Court noted in Maddox v. State, 760 So. 2d 89 (Fla. 2000), the Code also requires a trial court to impose a guidelines sentence which exceeds the statutory maximum where a defendant's score is greater than the statutory maximum. Id. Accordingly, the DCA sustained the trial court's denial of relief and, finding a conflict between these two provisions of the Code, certified the following question to this Court: "May a trial court sentence a defendant to a term in excess of the statutory maximum for an offense committed after October 1, 1998, where the lowest possible

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imprisonment not exceeding 5 years.").

sentence under the code exceeds the statutory maximum?" Id.

Obviously, legislative intent is the polestar that guides a court's inquiry in construing a statute, see M.W. v. Davis, 756 So. 2d 90, 100 (Fla. 2000); State v. Patterson, 694 So. 2d 55 (Fla. 5th DCA 1997), and the legislative intent in enacting the Criminal Punishment Code was a desire to provide sentencing courts (and the State) with greater upward discretion at sentencing. (Appendix B 11,12; Appendix B 1-2). In providing greater discretion, the Code returns to a pre-1983 sentencing structure by permitting a sentence up to and including the statutory maximum. (Appendix B 5; Appendix C 2). Unlike sentencing prior to 1983, however, the Code also establishes a sentencing "floor" which is determined by the bottom of the guidelines and any judge sentencing a defendant below this "floor" must provide written departure reasons. Id. This sentencing "floor" is plainly aimed at reducing the number of downward departure sentences, and a review of the legislative comments reveals that the Legislature was concerned with the high number of downward departure sentences imposed under the guidelines. (Appendix B 3-4; C 8-9).

For example, the legislative comments note that the Code "prohibits expressly, rather than 'discourages' a court to impose a sentence that is less than an offender's lowest

permissible sentence." (Appendix C 8). In that same vein, the hope was expressed that "if the starting point of prosecutors['] bargaining position is raised, then perhaps the outcome of the plea negotiations would be higher sentences." (Appendix B 12). The Legislature's intent in enacting the Code, then, was to provide greater upward sentencing discretion to the trial court while also limiting downward departure sentences. The challenged provisions reflect and effect the intent of the Legislature by providing greater upward discretion for a sentencing court than under the sentencing guidelines while also preserving the court's duty to impose a guidelines sentence which exceeds the statutory maximum[3]. In implementing these so-called conflicting provisions, Florida Rule of Criminal Procedure 3.704(d)(25) of the Code provides in part:

> **The permissible range for sentencing must be the lowest permissible sentence up to and including the statutory maximum,** as defined in section 775.082, for the primary offense and any additional offenses before the court for sentencing. The sentencing court may impose such sentences concurrently or consecutively. However, any sentence to state prison must exceed 1 year. **If the lowest permissible sentence under the Code**

[3]Thus, the application of the rule of lenity cannot save Butler's claim, since the courts are not required to interpret a statute "so strictly as to emasculate the statute and defeat the obvious intention of the legislature." State ex rel. Washington v. Rivkind, 350 So. 2d 575, 577 (Fla. 3d DCA 1977).

> **exceeds the statutory maximum sentence as provided in section 775.082, the sentence required by the Code must be imposed....**

(Emphasis added). As the foregoing excerpt of the Rule reveals, these two concepts set forth in sections 921.002(1)(g) and 921.0024(2), Florida Statutes, can easily be harmonized.

Section 921.002 is entitled "The Criminal Punishment Code" and subsection (1)(g) is a general provision of the Code permitting a sentencing court to impose a sentence up to and including the statutory maximum, and in most instances the range will start from the lowest permissible sentence (i.e., the low end of the guidelines) up to and including the statutory maximum. As noted previously, this section harkens back to pre-1983 sentencing by permitting the trial court to impose a sentence up to and including the statutory maximum. Section 921.0024 is entitled "Criminal Punishment Code; worksheet computations; scoresheets" and subsection (2) of that provision, on the other hand, applies only in those unique circumstances wherein due to the serious nature of the offenses before the court for sentencing or a defendant's lengthy prior record, the guidelines total exceeds the statutory maximum.

Butler makes much ado about the fact that these two provisions were passed on October 1, 1998, however the directive to impose a guidelines sentence where the guidelines sentence

exceeds the statutory maximum has been part and parcel of the sentencing statutes since January 1, 1994. See, e.g., Mays v. State, 717 So. 2d 515, 516 (Fla. 1998)("The legislature, however, amended the guidelines effective January 1, 1994, to provide that only departure sentences cannot exceed the statutory maximums."); Arnold v. State, 765 So. 2d 981, 982 (Fla. 4th DCA 2000) ("For offenses committed on or after January 1, 1994, if the recommended guidelines sentence exceeds the statutory maximum, the recommended guidelines sentence must be imposed.").

It is a well established principle that since the legislature is presumed to pass subsequent enactments with full awareness of all prior enactments and an intent that they remain in force a court is obligated to interpret two related statutes so that they harmonize with each other. See Palm Harbor v. Kelly, 516 So. 2d 249, 251-52 (Fla. 1987)("The courts' obligation is to adopt an interpretation that harmonizes two related, if conflicting, statutes while giving effect to both, since the legislature is presumed to pass subsequent enactments with full awareness of all prior enactments and an intent that they remain in force."), which was cited with approval by this Court in Cannella v. Auto-Owners Ins. Co., 801 So. 2d 94, 98 (Fla. 2001). As provisions identical to section 921.0024(2),

have been in effect since 1994, it is presumed that the Legislature was fully aware of this provision when enacting section 921.002(1)(g) and this Court is obligated to interpret these sections so that they harmonize.

Additionally, as this Court explained in Adams v. Culver, 111 So. 2d 665 (Fla. 1959),

> It is a well settled rule of statutory construction...that a special statute covering a particular subject matter is controlling over a general statutory provision covering the same and other subjects in general terms. In this situation "the statute relating to the particular part of the general subject will operate as an exception to or qualification of the general terms of the more comprehensive statute to the extent only of the repugnancy, if any." Stewart v. DeLand-Lake Helen etc., 1916, 71 Fla. 158, 71 So. 42, 47, quoting State ex rel. Loftin v. McMillan, 55 Fla. 246, 45 So. 882; American Bakeries Co. v. City of Haines City, 1938, 131 Fla. 790, 180 So. 524.

Id. at 667. In applying this principle herein, where a defendant's score exceeds the statutory maximum, the presumption is that the specific statute, i.e., section 921.0024(2), controls and operates as an exception to the general provision that the court may impose a sentence up to and including the statutory maximum pursuant to section 921.002(1)(g). Clearly, no conflict exists.

Based on the foregoing facts and authorities, this Court is

obligated to interpret section 921.002(1)(g), Florida Statutes, which provides the trial court with the discretion to impose a sentence up to and including the statutory maximum, with section 921.0024(2), Florida Statutes, which directs a sentencing court to impose a guidelines sentence where the guidelines sentence exceeds the statutory maximum, so that these provisions of the Code harmonize with each other. As these provisions do not conflict, this Court should refuse to accept jurisdiction herein or, assuming this Court does accept jurisdiction, to answer the certified question in the affirmative and let stand the DCA's opinion affirming the trial court's denial of relief.

POINT II

SECTION 921.0024(2), FLORIDA STATUTES, GIVES PERSONS OF ORDINARY INTELLIGENCE ADEQUATE NOTICE OF THE PROSCRIBED CONDUCT AND, THUS, IS NOT UNCONSTITUTIONALLY VAGUE.

Butler also argues that section 921.0024(2), Florida Statutes, is unconstitutionally vague in violation of the due process notice requirement. It should be noted that this argument was never argued or raised in the DCA. As such, this issue has not been preserved for review before this Court. See Trushin v. State, 425 So. 2d 1126, 1129-1130 (Fla. 1982)("The facial validity of a statute...can be raised for the first time on appeal even though prudence dictates that it be presented at the trial court level to assure that it will not be considered waived. The constitutional application of a statute to a particular set of facts is another matter and must be raised at the trial level.").

Even assuming it had been preserved for review, it is well settled that, where reasonably possible, a statute will be interpreted in a manner that resolves all doubts in favor of its constitutionality. See, e.g., State v. Mitro, 700 So. 2d 643, 645 (Fla. 1997); State v. Stalder, 630 So. 2d 1072, 1076 (Fla. 1994); State v. Elder, 382 So. 2d 687, 690 (Fla. 1980). It is also well recognized that in order to withstand a vagueness

challenge, a statute must give persons of ordinary intelligence adequate notice of the proscribed conduct. See, e.g., L.B. v. State, 700 So. 2d 370, 371 (Fla. 1997); Mitro, 700 So. 2d at 645; Bouters v. State, 659 So. 2d 235 (Fla. 1995).

Section 921.0024(2) (as had previous provisions identical to this section) gives persons of ordinary intelligence adequate notice of the fact that if based upon an individual's lengthy prior record or the seriousness of the offenses before the court for sentencing his or her guidelines sentence is greater than the statutory maximum the guidelines sentence must be imposed. Such an interpretation is apparent from the face of section 921.0024(2) and plainly passes due process muster.

In a similar vein, Butler relies on the rule of lenity. § 775.021(1), Fla. Stat. (2000) ("when the language [of a statute] is susceptible of differing constructions, it shall be construed most favorably to the accused"). However, while Butler correctly asserts that penal statutes must be strictly construed, this rule of strict construction arises from the argument raised in point II of Butler's brief, i.e., the due process requirement that criminal statutes must apprise ordinary persons of common intelligence what is prohibited. See Perkins v. State, 576 So. 2d 1310, 1312-13 (Fla. 1991). It is "to the extent that definiteness is lacking, that a statute must be construed most favorable to the accused." See Perkins, 576

So. 2d at 1312. Here, because the language of section 921.0024(2) is not susceptible of different constructions, there is no occasion to invoke this principle. No due process violation exists.

CONCLUSION

Based on the arguments and authorities presented herein, respondent respectfully prays this Honorable Court refuse to accept jurisdiction and let stand the decision of the Fifth District Court of Appeal denying relief, however, if this Court does accept jurisdiction, the certified question should be answered in the affirmative.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Merits Brief has been furnished by delivery by U.S. Mail to Caroline E. Kravath, Esq., Florida Institutional Legal Services, Inc., 1010-B NW 8th Avenue, Gainesville, Florida 32601, this 12th_ day of June, 2002.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

Respectfully submitted,

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