

IN THE SUPREME COURT OF FLORIDA

GREGORY BANKS,
Petitioner,
v.
STATE OF
FLORIDA,
Respondent.

CASE NO. SC01-2733

RESPONDENT'S SUPPLEMENTAL BRIEF

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PRELIMINARY STATEMENT

Parties (such as the State and Petitioner, Gregory Banks), emphasis, and the record on appeal will be designated as in the Answer Brief.

STATEMENT OF THE CASE AND FACTS

This Court entered its order of January 14, 2003, directing the parties to simultaneously submit supplementary briefs addressing the application of State v. Klayman, 27 Fla. L. Weekly S951 (Fla. Nov. 14, 2002), and Fiore v. White, 531 U.S. 225 (2001), to the present case.

ARGUMENT

ISSUE

DO THE DECISIONS OF STATE V. KLAYMAN AND FIGORE v. WHITE HAVE ANY IMPACT ON THE OUTCOME OF THE PRESENT APPEAL?

Standard of Review

Since this is a supplement to the parties initial briefs, the standard of review remains *de novo*.

Merits

Neither State v. Klayman, 27 Fla. L. Weekly S951 (Fla. Nov. 14, 2002), nor Fiore v White, 531 U.S. 225, 121 S.Ct. 712, 148 F.2d 629 (2001), are controlling under these facts and neither changes the result advocated by the respondent in its answer brief on the merits. Application of the holding in Heggs v. State, 718 So. 2d 263 (Fla. 2d DCA 1998), is not an interpretation of a criminal statute, but is merely recognition of a state constitutional provision - violation of the single-subject rule. Klayman and Fiore deal with statutory interpretation of a criminal offense statute and the failure of the state to prove all statutory elements.

In Heggs, the Court was concerned with the narrow question of whether Chapter 95-184, which included the 1995 sentencing guidelines, violated Article III, Section 6, of the Florida Constitution. The court held that it did, because it included provisions relating to domestic violence. This Court drew its remedy very narrowly, holding ". . . 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."¹

Fiore v. White

In Fiore the defendant was convicted of violating a Pennsylvania statute which prohibited operating a hazardous waste facility **without a permit**. Fiore argued in the trial court and on appeal that he did in fact have a permit but this defense was rejected on the basis that Fiore had deviated so dramatically from the terms of the permit that he had violated the statute by **de facto** operating such facility without a permit. The Pennsylvania appellate courts agreed, the Pennsylvania Supreme Court declined review, and the conviction became final. Subsequently, however, the Pennsylvania Supreme Court interpreted the statute for the first time in Fiore's co-defendant case and explicitly held that the statute meant what it said, "without a permit", and that one who "deviated" from a permit did not lose the permit. In other words, Fiore's conviction had **not** been obtained pursuant to statute. Fiore

¹For that reason the petitioner in this case is not entitled to relief because his sentence was (a) negotiated for a specific term of years and (b) could have been imposed under the 1994 guidelines without departure. Thus, it is immediately obvious that disposition of this case is not controlled or impacted by either Fiore, or Klayman because Banks is not entitled to relief even if Heggs is applied.

unsuccessfully sought collateral review in both state and federal courts. On review the United States Supreme Court framed the issue as to “. . . when, or whether, the Federal Due Process Clause requires a state to apply a new interpretation of a state criminal statute retroactively to cases on collateral review.” 121 S.Ct. at 713.

The Supreme Court then certified a question to the Pennsylvania Supreme Court concerning the effect of that court's decision. The reply was that Pennsylvania's decision “. . . did not announce a new rule of law. Our ruling merely clarified the plain language of the statute . . .” 121 S.Ct. at 714. Because this interpretation made it clear that Fiore did not violate the statute, as he had consistently maintained from the beginning, the Supreme Court held that the “. . . conviction is not consistent with the demands of the Federal Due Process Clause,” 121 S.Ct. at 713, that all elements of a statutory crime be proven beyond a reasonable doubt. Indeed, the Court went on to point out that the state itself had agreed from the beginning that there had been a permit to operate the facility.

State v. Klayman

In Klayman, the defendant had been convicted of trafficking in hydrocodone. He was appealing denial of his motion for postconviction relief. He argued that the trial court erred in declining to apply this Court's decision in Hayes v. State,

750 So.2d 1 (Fla. 1999). Hayes held that the trafficking statute did not apply to possession of hydrocodone in amounts under fifteen milligrams per dosage unit. The court found that hydrocodone can be a schedule II or III drug depending on the dosage unit. The court concluded that since the mixture possessed by Hayes did not contain a Schedule I or II drug, she could not be convicted of trafficking. Klayman found himself in the same position as Hayes and argued that his conviction must be set aside.

This court framed the issue in Klayman as follows:

The question posed in the present case is whether [the Hayes] holding should be applied to final cases wherein the lower courts construed the statute differently and imposed trafficking convictions based on mixtures that did **not** contain a Schedule I or II drug. (emphasis, the court's)

This Court looked to Fiore for the proposition that "whereas a **change** in the law may be analyzed in terms of retroactivity, a **clarification** in the law does not implicate the issue of retroactivity." (emphasis, the court's). This Court went on to say

It thus is clear under Fiore that, if a decision of a state's highest court is a clarification in the law, due process considerations dictate that the decision be applied in all cases, whether pending or final, that were decided under the same version (i.e. the clarified version) of the applicable law. Otherwise courts may be imposing criminal sanctions for conduct that was not proscribed by the State legislature.

The court concluded that ". . . a simple clarification in the law does not present an issue of retroactivity and thus does

not lend itself to a [Witt v. State, 387 So. 2d 922 (Fla. 1980)] analysis."

Fiore and Klayman Are Not Applicable to the Instant Case

The State points out the following.

First, Heggs by its terms does not apply when the actual sentence imposed under the 1995 sentencing guidelines also falls within the guidelines range of the 1994 statute. The sentence here is within the range of both guidelines and does not illegally exceed the statutory maximum. Fiore and Klayman have no relevance.

Second, the sentence here was entered on a plea bargain and does not exceed the statutory maximum. Petitioner has not moved to withdraw from the plea and, if he did so, would not be able to show any violation of Heggs. In the unlikely event, he was successful in withdrawing from the plea, the state would be entitled to either withdraw from the plea itself or to seek any sentence within the statutory maximum. This would also raise the question of laches. In either event, Fiore and Klayman have no impact.

Finally, both Fiore and Klayman are concerned with the **language** of a statute and the application of a judicial interpretation of that statute to crimes charged under the statute. In each instance the respective lower courts had interpreted or applied statutory language in such a way that

the appellants could not have been convicted of the particular crime under the "new" interpretation. It was the **language** of the statute that was the subject of the analysis, and it was the **language** of the statute that dictated the ultimate results in both Fiore and Klayman.

Heggs does not deal with the language of any statute and does not raise any issues of statutory interpretation. Rather, it exposes a constitutional infirmity that existed the moment that Chapter 95-184 was passed. All that was required to expose this infirmity was reasonably due diligence in the research of the act. And, once exposed, there was nothing to interpret. All that was required was to apply the single-subject rule. Thus the decision in Heggs was certainly not a clarification of the law and does not involve an actual conviction for a statutory crime. The sentence imposed was within the statutory maximum and there is no question of the legality or constitutionality of the sentence. That being the case, there is no due process violation that triggers the holdings in Fiore or Klayman.

Given the forgoing, it is clear that the Fiore/Klayman analysis of "clarification" is not applicable to the instant case. Consequently, this Court should disregard the holdings of those cases in analyzing the issues presented in this case.

CONCLUSION

The State reiterates its positions in its answer brief and prays for the relief requested therein.

SIGNATURE OF ATTORNEY AND CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to Kevin M. O'Brien, Holland and Knight LLP, P.O. Drawer 810, Tallahassee, Florida 32302., by MAIL on February 3, 2003.

Respectfully submitted and served,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the font requirements of Fla. R. App. P. 9.210.

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