

In The Supreme Court of Florida
(Lower Court Case No. : 4D00-3788)

ORIGINAL

Case No. SC01-2750

FILED
THOMAS B. HALL
APR 01 2002
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BY

State of Florida,
Petitioner,

vs.

Alphonso Fletcher,
Respondent.

Respondent's Answer Brief on the Merits
On review from the
District Court of Appeal, Fourth District

Alphonso Fletcher
Pro se Litigant
Everglades Correctional
P.O. Box 949000
Miami, Florida 33194-9000
AZ-216-L / DC# 0-613698

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Preliminary Statement

Alphonso Fletcher, is currently a state prisoner in the Florida Department of Corrections housed at Everglades Correctional Institution, pursuant to a conviction and sentence imposed by the Honorable Paul L. Backman, Circuit Court Judge, In and For Broward County, Florida and will be referred to as Respondent / Appellant or Fletcher. The state of Florida will be referred to as the Petitioner or state. The trial record or records on appeal will be referred to as T. R. or R.

Statement of the Case And Facts

Respondent, on March 24, 2000, filed a motion to correct illegal sentence pursuant to Fla. R. Crim. P. 3.800(a) motion, in which he asserts that he is entitled to be re-sentenced under the 1994 sentencing guidelines, pursuant to this Court's decisions in Heggs v. State, 759 So2d 620 (Fla. 2000); and Trapp v. State, 760 So. 2d 924 (Fla. 2000).

On June 19, 2000, the state did file their response to the motion claiming that because appellant/respondent received an upward departure sentence of 40 years, he was not adversely affected by the 1995 sentencing guidelines (R). On June 28, 2000, the trial court denied the motion for the "reasons contained in the state's response".

On July 12, 2000, the respondent filed a reply to the state's response (R). On November 8, 2000, the trial court denied same but failed to attach portion of the record refuting respondent Heggs challenge (R).

Respondent appealed the denial of the trial court's order to the Fourth District Court of Appeal, and on March 30, 2001, that court directed petitioner to show

Cause why the trial court's order denying the Motion should not be reversed (R). On appeal, Respondent argue that, in the Fourth District's previous decisions in Davis v. State, 791 So2d 1137 (Fla. 4th DCA 2001); Lemon v. State, 769 So2d 417 (Fla. 4th DCA 2000); Fletcher v. State, 800 So2d 626 (Fla. 4th DCA 2001) that was correctly ruled upon in their decisions, Respondent was entitled to relief under Heggs because the statutory factors was invalid to the respondent and the trial court did utilized the 1995 sentencing guidelines after the state filed their Motion to aggravate. The Respondent points out that the state, court (trial court) used against him the aggravated guideline departure from the 1995 sentencing guidelines scoresheet in which he is entitled to relief under Heggs.

Respondent argued and continually argue that it will not be disputed and can not be disputed that Respondent Fletcher would have received the same 40 year sentence without a departure. Heggs; Lemon; Fletcher. The Fourth District Court of Appeal gave the trial court, the state out of the Fourth District enough time to refute the respondent Heggs challenge but they fail to refute and demonstrated against the Respondent's Heggs Challenge, and thereafter the Fourth District reversed and remanded his sentence for further consideration of his sentencing challenge. See Lemon v.

State, 769 so.2d 417 (Fla. 4th DCA 2000). In the Fourth DCA review of the record reveals that Respondent received a guideline aggravated departure. Thus, that Court cannot agree with the trial court that respondent was not adversely affected by use of the 1995 scoresheet. Thereafter, the trial court did properly re-sentenced the Respondent to a properly prepared, corrected 1994 guideline scoresheet to 91.5 months in the Florida department of correction in which Respondent is housing at Everglades correctional Inst. and to wit, is preparing to be transfer to Tomoka Correctional Institution for a Job Trade.

Summary of the ARGUMENT

The Fourth District was correct in reversing the denial of Respondent's Motion To Correct Sentence. First, it should be sufficient to show from the Fourth District Records and the respondent original Motion and his Initial Brief from the Fourth District that the State in both courts could not show or refute the Respondent Heggs Challenge that he would have received the same 40 year sentence without a departure from the 1994 sentencing guidelines. It clearly reveals from the record that it was appropriate in the Fourth District decision in remanding for further consideration of his sentencing challenge. This is not an evidentiary determination matter because it appears from the face of the record that Respondent received an aggravated guideline departure sentence from the 1995 sentencing guideline scoresheet. Second, the Statutory Aggravating reasons given for departure in this case are invalid because the reasons given are consistent with the respondent's co-defendants. Accordingly, Mr. Jones testified that it was James idea to rob (R.272).

ARGUMENT I

The Trial Court Reversibly Erred
In Departing Upward From The
Guidelines Because None OF The
Grounds For Departure Are Valid
In This Case

A. Victim Especially Vulnerable Due To Age or Physical or Mental Disability

Respondent asserts once again as to the departure sentence: statute authorizing sentencing enhancement of armed robbery sentence on that basis and that at the pretrial nor trial nor at the sentencing hearing was the departure ground ever proven by a preponderance of the evidence that the victim was especially vulnerable by the defendant due to age or physical or mental disability. The state did in fact rely on this departure ground as to all crimes. Therefore, this was not a valid ground for departure. See: Green v. State, 662 so.2d 748 (Fla. 4th DCA 1995); Johnson v. State, 689 so.2d 1111 (Fla. 2nd DCA 1997); Rosado v. State, 691 so.2d 595 (Fla. App. 4th Dist. 1997); Williams v. State, 691 so.2d 1158 (Fla. 4th DCA 1997); Cooper v. State, 764 so.2d 934 (Fla. App. 4th Dist. 2000).

Respondent argues that this stated reason for departure is improper because it essentially inheres in the crime itself: ie and that the state must have additional factors to aggravate the defendant / Respondent sentence. The Respondent never came in contact with the victim as far as this ground being applicable.

The Statute Does Not Clearly Allow
The Precise Reason Given By The Trial
Judge To Authorize An Enhancement
Of A Sentence For Victim Vulnerability
On The Fact Present Here

This Statutory reason for an enhancement departure comes from section 921.0016(3)(j), Florida Statutes (1995) which provides:

(3) Aggravating circumstances under which a departure from the sentencing guidelines is reasonably justified include, but are not limited to:

(j) The victim was especially vulnerable due to age or physical or mental disability.

When the trial court imposes departure sentence, facts that support departure must be proven by the preponderance of the evidence. West's F.S.A. R. Cr. P. Rule 3.701(b)(60), Wray v. State, 639 so.2d 621 (Fla. 4th DCA 1994). Sentence departure cannot be based on reasons that are factored into guidelines scoresheet or are inherent components of the crime. see: Mischler v. State, 488 so.2d 523 (Fla. 1986); Shull v. Dugger, 515 so.2d 748 (Fla. 1987); Darrisaw v. State, 642 so.2d 615, 617 (Fla. 4th DCA 1994). The court's first departure reason, victim vulnerability based on physical disability, does not justify departure in the instant case. section 921.0016(3)(j), Florida Statutes (1996) provides for a departure from the sentencing guidelines if "the victim was especially vulnerable due to age or physical or mental disability". There was no evidence offered to support the departure

in the case at bar to the respondent, only his co-defendants .
See: Wemett v. State, 567 so.2d 882 (Fla. 1990).

Therefore, this ground is inapplicable to the Respondent.

B. Defendant Induced A Minor To Participate In Any Of The Offenses Pending Before The Court For Disposition.

This ground is also not supported by a preponderance of the evidence, more importantly, even if the co-defendant was a juvenile when the crime occurred, there is nothing in the record to suggest that Respondent induced a minor to commit such crime. Indeed, here as in Larry v. State, 527 so.2d 883 (Fla. 1st DCA 1988), we don't know "who induced who" Id. at 883. See Also: Grant v. State, 586 so.2d 438 (Fla. 1st DCA 1991); Von Carter v. State, 468 so.2d 276, 280 (Fla. 1st DCA 1985) (" The second reason is invalid because the fact that the defendant carried out the crime with the assistance of a minor is insufficient to justify a departure There was no specific evidence presented which would indicate the Respondent had sufficient control and authority over the minor to justify a departure from the guidelines").

This statutory reason for an enhancement departure comes from section 921.0016(3)(8).

(3) Aggravating circumstance under which a departure from sentencing guidelines is reasonably justified include, but are not limited to:

(8) Defendant induced a minor to participate in any of the offenses pending before the court for disposition.

Respondent also continues to contend that the sentence imposed in the case at bar, which sentence exceeded the guidelines, are invalid because the reasons given therefore are not clear and convincing. see: Von Carter v. State, 468 so.2d 276, 280 (Fla. 1st DCA 1985). Fact that respondent co-perpetrator was a minor was not a clear and convincing reason justifying departure from the sentencing guidelines where the court made no finding that respondent induce or exercised any authority or control over the minor. Larry v. State, 527 so.2d 883 (Fla. 1st DCA 1988); Williams v. State, 492 so.2d 1308 (Fla. 1986); Kellar v. State, 640 so.2d at 129 (Fla. App. 1st Dist 1994); Jones v. State, 669 so.2d 1097 (Fla. App. 3rd Dist 1996).

Therefore, this departure ground is also inapplicable as it is unsupported by a preponderance of the evidence.

C. Primary Offense Is At Level 7 or Higher And The Defendant Has Been Convicted of One or More Offense That Scored, or Would Have Scored, At An Offense Level 8 or Higher.

The trial court's third and final reason for departure is based on section 921.0016(3)(R), which provides that "the primary offense is scored at offense level 7 or higher, in which respondent only have a level four as a prior which is a grand theft a third degree felony. The respondent argues that the state did not establish this by a preponderance of the evidence by failing to introduce a certified copy of the prior conviction or other documentation refuting the defendant/respondent claim in the sentencing hearing and thereafter. One of the most fundamental principles of Florida law is that penal statutes must be str-

ictly construed. e.g., State v. Jackson, 526 so.2d 58 (Fla. 1988) . This principle ultimately rests on the due process requirements that criminal must say with some precision exactly what is prohibited. Unfortunately, s. 921.0016(3) (r), has not yet been construed by an appellate court and is ambiguous. Respondent contends that this departure ground is "inapplicable in this case because" has been convicted" means convicted of an offense level 8 or higher before the commission of the crime for which departure sentence is imposed. This interpretation of the statute would be consistent with the legislature's policy reflected in the habitual felony offender statute that an individual who has been convicted, subsequently commits another offense, has rejected his or her opportunity to reform and should be sentence more harshly. s. 775.084(5) Fla. Stat. (1996). In this case, Respondent did not commit the crime for which departure was imposed after he was convicted of the level 8 offense or higher. Finally, the respondent questions the validity of this reason for departure since it amounts to double counting the defendant's / Respondent's prior conviction where it has already been used in arriving to a point total for the presumptive sentence range. see: Hendrix v. State, 475 so.2d 1218 (Fla. 1985).

In State v. Darrisaw, 660 so.2d 269, 271 (Fla. 1995) Criminal activity already included on the defendant's Score-sheet, however, may not be considered a second time for departure reasons. Hendrix v. State, 475 so.2d 1218, 1220 (Fla. 1985).

(Respondent's prior conviction(s) could not be used as basis for departing from presumptive sentence under sentencing guidelines, where prior record had been used in arriving at point total for presumptive sentence range).

At a minimum, s. 921.0016 is ambiguous as to what "has been convicted" mean, and any ambiguity in a criminal statute must be resolved in favor of the accused. Negron v. State, 306 so.2d 104 (Fla. 1975). When construing a statute, we must follow the intent of the legislature, as expressed by the language of the statute, giving the statutory language its usual and ordinary meaning, unless an ambiguity exists. Graham v. State, 472 so.2d 464 (Fla. 1985); Holly v. Auld, 450 so.2d 217 (Fla. 1984). A criminal statute is strictly construed in favor of the accused. State v. Jackson, 526 so.2d 58 (Fla. 1988); Meeke v. State, 754 so.2d 102, 103 (Fla. App. 1 Dist. 2000).

Apparently, in departing upward from the guidelines the record shows that the trial court was in error for applying the firearm statute 775.087(1) after contesting that the respondent never possessed a Firearm, thereafter the court also error by enhancing the Robbery from a second degree felony up to a first degree felony. In this case, Respondent Fletcher never possessed a firearm and the trial court record does not indicate that Fletcher committed

said crime nor did the record indicate that he passed, carry, or displayed any deadly weapon.

Because none of the departure grounds are valid in this case, respondent's forty (40) year prison sentence must be reversed based on "Matter of Law" and remanded concurrent with the Fourth District Decision in Fletcher v. State, 800 so.2d 626 (Fla. App. 4 Dist 2001); Lemon v. State, 769 so.2d 417 (Fla. 4th DCA 2000).

Noted: The evidence presented at trial did not reach the level of proof necessary to establish anyone of the three reasons given for departure by a preponderance of the evidence.

Also Note: The trial judge stated in the respondent sentencing hearing as follow:

I think some of the matters which the state raised in their motion to aggravate are matters which the Florida Supreme Court has indicated are not appropriate factors to aggravate. While they are listed within the context of the Florida statutes, it becomes a very interesting determination as to which takes greater priority, the listing by the legislature of the statutory reasons to aggravate or the

Supreme Court's dictate that in particular cases they don't apply. (TR. Vol IV page 575 line 22 - 25 and 576 line 1-8).

Here, in the instant case, the trial Judge was never for sure on whether he could or not rely on the state's reasons to aggravate based on the Florida Supreme Court has indicated are not appropriate factors to aggravate or the legislature statutory reasons. The Judge indicated that it becomes a very interesting determination as to which of the two (The Supreme Court or The legislature) that takes greater priority. The Respondent points out that the trial Judge was never sure as to who he should rely on in making his determination as to whether he should depart outside the guidelines based on the state's three reasons to aggravate. Furthermore, the trial Court sentenced the Respondent to an upward departure without giving valid written reasons for departure. See Cooper v. State, 764 so.2d 934 (Fla. App. 4th Dist 2000); Rosado v. State, 691 so.2d 595 (Fla. App. 4th Dist. 1997); Shull v. Dugger, 515 so.2d 748 (Fla. 1987); Larry v. State, 527 so.2d 883 (Fla. 1st. DCA 1988); Hendrix v. State, 475 so.2d 1218 (Fla. 1985); State v. Jackson, 526 so.2d 58 (Fla. 1988); Negron v. State, 306 so.2d 104 (Fla. 1975).

The trial court erred in imposing any departure sentence greater than the permissible one-cell upward increase.

Therefore, based on these findings this also was erred not to give valid reasons for departure in writing by the trial judge and being so as a "Matter of Law" the respondent should be entitled to resentencing within the guidelines. relying on Cooper, Shull v. Dugger, Hendrix, Jackson, Negrón.

ARGUMENT II

The Respondent Sentence is
Illegal Pursuant To The Heggs
Ruling

Once again the respondent alleging that he is adversely affected by the Heggs Ruling because the trial court did in fact committed reversible error within the sentencing structure and that therefore it became illegal as well as unconstitutional under the 1995 sentencing guidelines. Accordingly, the Supreme Court held in Heggs v. State, 759 So.2d 620 (Fla. 2000) that Chapter 95-184, Laws of Florida does in fact violates the single subject rule contained in Article III, section

6, of the Florida Constitution.

The respondent did in fact fall within the window period because his offense occurred on February 2, 1996 which the Supreme Court held that the window period for challenges to Chapter 95-184, would begin on its effective date of October 1, 1995, when Chapter 97-97, Laws of Florida reenacted the 1995 amendments in Chapter 95-184, as part of the Florida Statutes biennial adoption. see: Trapp v. State, 760 So.2d 924 (Fla. 2000); Williams v. State, 25 Fla. L. Weekly (D) 2101 (Fla. 1st DCA 2000); Smith v. State, 25 Fla. L. Weekly (D) 1273 (Fla. 1st DCA 2000).

The single subject rule was violated by act containing sentencing guidelines and provisions for domestic violence, therefore, making Chapter 95-184, illegal as well as unconstitutional. see: Heggs v. State, No SC 93851; Smarr v. State, 26 Fla. L. Weekly (D) 5676 (Fla. 2001); Schumaker v. State, 773 So.2d at 516 (Fla. 2000); Etienne v. State, 26 Fla. L. Weekly (D) 924 (Fla. 4th DCA 2001); Lemon v. State, 769 So.2d 417 (Fla. 4th DCA 2000); Fletcher v. State, 800 So.2d 626 (Fla. 4th DCA 2001).

The trial court sentenced the respondent to a guideline aggravated departure sentence under the 1995 sentencing guidelines.

In the Fourth District, reversed and remanded for attachments of portions of the record refuting Respondent's Heggs Challenge, or further consideration of his Sentencing Challenge. See Lemon v. State, 769 so.2d 417 (Fla. 4th DCA 2000).

The Fourth District review of the record reveals that respondent received a guideline aggravated departure, Thus, we cannot agree with the trial court that appellant was not adversely affected by use of the 1995 scoresheet. see Exhibit "A" 1995 scoresheet.

The trial court failed to demonstrate and also attach portions of the record refuting respondent Heggs Challenge.

The Fourth District reviewed the record and reveal that respondent did in fact received a guideline aggravated departure and that respondent was adversely affected by use of the 1995 scoresheet.

Respondent continue to argue that not only that the trial court fail to demonstrate and attachments of portions of the record refuting his Heggs Challenge but failed to acknowledge that respondent received a guideline aggravated departure sentence.

once again, in order to be entitled to relief pursuant to Heggs, the defendant/appellant/Respondent must allege that he or she does in fact meet both prongs under the Heggs decision as follow:

1. His or Her crime fall within the window period covered by Heggs?
2. His or Her sentence could not have been imposed without a departure from the 1994 sentencing guidelines ?

If both answers are affirmative, the respondent should be resentence in accordance with the valid laws in effect at the time that the respondent committed his offense(s).

In this case at bar, the respondent offense did occur within the window period and that he could not have been able to receive the same forty (40) year sentence under the 1994 guidelines without a departure. see Schumaker; Lemon; Davis; Fletcher.

Therefore, Fletcher does in fact meet the two prong test of Heggs and is entitled to relief.

Respondent Fletcher also contends that his departure sentence are governed by the unconstitutional chapter law challenged in this case, and that therefore, his sentence is illegal and that the Fourth District Court was correct when they reversed Respondent sentence because the state never attach portion of the record conclusively refuting his Heggs challenge nor has the state shown that respondent would probably have received the same forty (40) year sentence under the 1994 sentencing guidelines without a departure. see Schumaker.

Ray, Kwil cases from the Second District is inconsistent, ambiguous to respondent because the statutory reasons for departure may have been consistent to their crime(s) but the respondent statutory reasons for departure was based solely on his co-defendants which the record reveals that the respondent did not have anything to do with the said crime.

Conclusion

Accordingly, the respondent Answer Brief should be granted in favor of the Fourth District Court ruling which was rendered on August 29, 2001. It is so prayed.

Respectfully Submitted,
Alphonso Fletcher

Alphonso Fletcher # 613698
Everglades Correctional Inst.
P.O. Box 949000
Miami, Florida 33194-9000
A2-216-L