IN THE SUPREME COURT OF FLORIDA
(Lower Court Case No.: 4D00-3788)

CASE NO. SC01-2750

STATE OF FLORIDA,

Petitioner,

vs.

ALPHONSO FLETCHER,

Respondent.

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PETITIONER'S INITIAL BRIEF ON THE MERITS
On review from the
District Court of Appeal, Fourth District

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PRELIMINARY STATEMENT

The Petitioner was the Prosecution and Respondent was the Defendant in the Criminal Division of the Circuit Court of the Seventeenth Judicial Circuit, in and for Broward County, Florida. In this brief, the parties shall be referred to as they appear before this Honorable Court of Appeal except that Petitioner may also be referred to as the State.

In this brief, the symbol "R" will be used to denote the record on appeal.

All emphasis in this brief is supplied by Petitioner unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

After being convicted of robbery with a firearm, Respondent, on March 24, 2000, filed a motion to correct illegal sentence pursuant to Fla. R. Crim. P. 3.800(a)("Motion") wherein he claims that he is entitled to be re-sentenced under the 1994 sentencing guidelines, pursuant to this Court's decisions in Heggs v. State, 759 So.2d 620 (Fla. 2000) and Trapp v. State, 760 So.2d 924 (Fla. 2000)(R).

On June 19, 2000, the State filed its response to the Motion claiming that because Appellant received an upward departure sentence of 40 years[1], he was not adversely affected by the 1995 sentencing guidelines (R). By order dated June 28, 2000, the trial court denied the Motion "for the reasons contained in the State's Response...." (R).

Appellant then filed a belated reply to the State's response to his Motion on July 12, 2000 (R). The trial court, apparently treating the belated reply as a motion for reconsideration, denied same by order dated November 8, 2000

[1]The reasons relied by the sentencing court in imposing the departure sentence were that (1) the victim was especially vulnerable due to age or physical or mental disability; (2) Appellant induced a minor to participate in the offense; and (3) the primary offense was scored at level 7 or higher and Appellant has been convicted of one or more offense that scored, or would have scored, at an offense level 8 or higher (R).

(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, Petitioner argued that, despite the Fourth District's previous decisions in Davis v. State, 791 So.2d 1137 (Fla. 4th DCA 2001)[2] and Lemon v. State, 769 So.2d 417 (Fla. 4th DCA 2000), rev. granted, 791 So.2d 1101 (Fla. 2001), Respondent was not entitled to relief under Heggs because the statutory factors utilized by the trial court in determining whether and to what extent to upward depart from the 1995 sentencing guidelines were unaffected by Heggs. Thus, Petitioner argued that the same departure sentence sentence could have been imposed under the 1994 sentencing guidelines, and therefore, Respondent has not demonstrated that he has been prejudiced by utilization of the 1995 ones. Heggs; Kwil v. State, 768 So.2d 502 (Fla. 2d DCA 2000); Ray v. State, 772 So.2d 18 (Fla. 2d DCA 2000).

The Fourth District Court rejected Petitioner's argument and, following Davis and Lemon, reversed the trial court's

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[2]Petitioner notes that it has filed a notice to invoke the discretionary jurisdiction of this Court. State v. Davis, Case No.: SC01-1600.

order summarily denying the Motion. In doing so, the Court remanded for attachment of the record refuting Respondent's claim, "or further consideration of his sentencing challenge." Fletcher v. State, 800 So.2d 626 (Fla. 4th DCA 2001)(App. A). On Petitioner's motion, the Fourth District certified conflict with Kwil and Ray, as it had done in Davis. Fletcher (App. A). This appeal follows.

SUMMARY OF THE ARGUMENT

The Fourth District erred in reversing the denial of Respondent's motion to correct sentence. First, it should be sufficient to show that the trial court **could** have imposed the same departure sentence under either the 1994 or 1995 sentencing schemes. Second, given the fact that this was an appeal from a motion to correct illegal sentence, it was inappropriate to "remand for further consideration of his sentencing challenge." This is an evidentiary determination not appropriate for resolution in a Fla. R. Crim. P. 3.800(a) proceeding. Because the trial court's order denying the motion to correct sentence should have been affirmed in its entirety, this Court must quash the decision of the appellate court insofar as that court purported to reverse the trial court's denial of the motion to correct.

ARGUMENT

THE TRIAL COURT WAS CORRECT IN SUMMARILY DENYING APPELLANT'S MOTION TO CORRECT SENTENCE UNDER HEGGS SINCE THE UPWARD DEPARTURE SENTENCE *COULD* HAVE BEEN IMPOSED UNDER THE 1994 GUIDELINES AS WELL AS THE 1995 GUIDELINES AND THE FOURTH DISTRICT ERRONEOUSLY REVERSED AND REMANDED.

In the instant case, Respondent filed a Fla. R. Crim. P. 3.800(a) motion asserting that he was entitled to re-sentencing pursuant to Heggs. The trial court denied that motion and Respondent appealed the order to the Fourth District Court of Appeal. The Fourth District reversed the trial court's denial of the motion The State submits that the Fourth District erred in doing so.

Relying on its decisions in Lemon and Davis, the Fourth District stated, "[o]ur review of the record reveals that Appellant 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." Fletcher. (App. A).

This Court, in Heggs, held that the 1995 amendments to the 1994 Guidelines were, for a time, unconstitutional because the chapter law which instituted the amendments violated the

single subject rule. This Court later found that only people who committed their offenses during the window period from October 1, 1995, to May 24, 1997, had standing to attack sentences imposed under the 1995 guidelines on the grounds that the sentences were imposed pursuant to these unconstitutional statutory amendments. Trapp v. State, 760 So. 2d 924 (Fla. 2000). In turn, only those people "adversely affected" by the unconstitutional amendments were entitled to relief. Heggs, 759 So. 2d at 627.

Although Respondent appears to have standing to assert a Heggs challenge since (1) the offense was committed on February 1, 1996, which is within the window period established by Trapp, and (2) a 1995 guideline scoresheet was prepared in that case, Respondent is not entitled to Heggs relief because Respondent was not adversely affected by the unconstitutional amendments to the guidelines. Respondent was not adversely affected because the 40-year sentence imposed was an upward departure sentence. Further, as argued below, there were no changes to the statutory aggravating factors relied upon by the trial court between the 1994 and 1995 guidelines.

In other words, because the sentence was an upward departure, Respondent could still have received the same

sentence regardless of whether the trial court prepared a 1994 guidelines scoresheet or a 1995 guidelines scoresheet. Respondent thus has failed to demonstrate that he was adversely affected by the use of a 1995 scoresheet as is required by Heggs. Cf., Hines v. State, 587 So. 2d 620 (Fla. 2d DCA 1991)(error in calculation of scoresheet harmless where departure sentence would have been imposed regardless), approved *sub nom.*, State v. Mackey, 719 So. 2d 284 (Fla. 1998)(error in use of wrong scoresheet harmless where its use benefitted rather than harmed defendant); Rubin v. State, 734 So. 2d 1089 (Fla. 3d DCA 1999)(error in scoresheet calculation harmless where trial court would have imposed departure sentence anyway). Accordingly, the trial court properly denied his claim for relief on this ground.

The Second District correctly recognized that Heggs relief was not available for upward departure sentences in Kwil and Ray. In those cases, the Second District noted that the record reflected that the trial court sentenced the defendants to an upward departure sentence based on three statutory factors that were equally valid under the 1994 and 1995 sentencing guidelines. The Second District stated that because the defendants were not, therefore, adversely affected by the unconstitutional amendments to the sentencing

guidelines, they were not entitled to relief.

This Court's own decision in Heggs supports the State's reasoning in the instant case and the Second District's reasoning in Kwil and Ray. Although the facts of the Heggs case are distinguishable from those at bar, as well as those in Kwil and Ray in that Heggs did not involve a upward departure sentence, the general principles announced in Heggs are still applicable to the instant case. In Heggs, this Court held that relief would not be due where it could be shown that the trial court **could** have imposed the same 1995 guidelines sentence under the 1994 guidelines without a departure. In so doing, this Court did not require the trial court, in denying a Heggs claim, to demonstrate that it **would** have imposed the same sentence under the 1994 guidelines; rather, this Court made it clear that it was sufficient to demonstrate that the trial court **could** have imposed the same sentence under the 1994 guidelines.

This is contrary to the Fourth District's conclusion in this case and in Lemon where it stated that "relief may not be due where it can be shown that the trial court **would** have imposed the same 1995 guidelines departure sentence under the 1994 guidelines." Lemon, 769 So. 2d at 418 (emphasis added). Essentially, the Fourth District has imposed a heavier burden

than Heggs allows.

Other cases support the State's reasoning. For example, Heggs does not apply in cases where a defendant is sentenced as a habitual offender. Arce v. State, 762 So. 2d 1003 (Fla. 4th DCA 2000)(a habitual offender sentence is not subject to the guidelines provisions of section 921.001); Ford v. State, 763 So. 2d 1273 (Fla. 4th DCA 2000)(same). See also, s. 775.084(4)(g), Fla. Stat. (1997) ("A sentence imposed under this section [the habitual offender section] is not subject to s. 921.001 [the guidelines].")(clarification added); Allen v. State, 740 So. 2d 1180 (Fla. 2d DCA 1999); Robinson v. State, 654 So. 2d 1302 (Fla. 5th DCA 1995)(affirming denial of rule 3.800 motion based on claim that sentence was illegal due to scoresheet errors where defendant had been sentenced as habitual offender and was not subject to sentencing guidelines).

Although a guidelines scoresheet must be prepared even in habitual offender cases, a defendant who is sentenced as a habitual offender is not sentenced pursuant to the guidelines and is therefore not "adversely affected" by any errors in the preparation of the scoresheet. It is similarly arguable that although a guidelines scoresheet was prepared in the instant case, the defendant, by virtue of being sentenced to an upward

departure sentence, was sentenced **outside the guidelines.** That is, because when the trial court found clear and convincing reasons to depart from the guidelines, the trial court essentially found that the guidelines did not apply and sentenced the defendant outside the guidelines to what was, effectively, a non-guidelines sentence. Respondent was therefore not adversely affected by any errors in the preparation of the scoresheet, including the error of utilizing a 1995 scoresheet instead of a 1994 scoresheet.

It is interesting to note that subsequent to the Fourth District's issuance of the Lemon opinion, that Court issued an opinion in another case, McCray v. State, 769 So. 2d 1126 (Fla. 4th DCA 2000). In McCray, the Fourth District affirmed the denial of a Fla. R. Crim. P. 3.800(a) motion in which the defendant had entered a plea that provided for a specific sentence with the understanding that the sentence was an upward departure from the 1995 sentencing guidelines. The district court stated that under the circumstances the appellant could not claim that his sentence was adversely affected by the amendment to the 1995 sentencing guidelines in order to qualify for re-sentencing under Heggs. The State would submit that the McCray opinion actually supports the State's position in this case and conflicts with the reasoning

in Lemon and Davis.

Moreover, in order to file a motion under Fla. R. Crim. P. 3.800(a), an illegal sentence must be apparent from the face of the record or, in other words, the issue must be capable of resolution without an evidentiary determination. State v. Callaway, 658 So. 2d 983, 987-988 (Fla. 1995). To inquire any further into Respondent's claim requires an inquiry into matters not apparent from the face of the record. Yet, the Fourth District, in their opinion in this case, reversed and remanded for consideration of "whether the trial court would have imposed the same 1995 guidelines departure sentence under the 1994 guidelines or further consideration of his sentencing challenge." Consideration of this issue could require an evidentiary determination, an evidentiary determination which is not appropriate in a Fla. R. Civ. P. 3.800(a) proceeding. It is clear that the Fourth District should have affirmed the denial of the motion because, under their analysis, the resolution of the issue in question would almost certainly require an evidentiary determination in order to resolve it.

The State reiterates once more that since Respondent was sentenced to an upward departure, the constitutionality, or lack thereof, of the 1995 amendments to the guidelines did not

prejudice Respondent in any way as the same upward departure sentence could also have been lawfully and permissibly imposed even if a 1994 guidelines scoresheet had been prepared instead of a 1995 guideline scoresheet. Moreover, because this was a proceeding involving a motion to correct illegal sentence, the inquiry should have ended here and the appellate court should not have remanded for consideration of an issue which essentially requires an evidentiary determination. Accordingly, this Court must quash the Fourth District's opinion which purports to reverse the trial court's order denying the motion to correct illegal sentence.

CONCLUSION

Based on the foregoing arguments and authorities cited therein, the State of Florida respectfully requests this Honorable Court to QUASH the lower court's decision and AFFIRM the trial court's order denying the Motion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing "Petitioner’s Initial Brief on the Merits" and

"Appendix" has been furnished to: ALPHONSO FLETCHER, Pro Se, DC #0-613698, Everglades Correctional Institution, Post Office Box 949000, Miami, Florida, 33194-9000, this ___ day of February, 2002.

_____
Of Counsel

CERTIFICATE OF TYPE SIZE AND STYLE

The undersigned hereby certified that the instant brief has been prepared with 12 point Courier New type, a font that is not proportionately spaced, this ____ day of February, 2002

_____
AUGUST A. BONAVITA
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APPENDIX

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