

IN THE SUPREME COURT OF FLORIDA

TRAVIS A. TROTTER,

Petitioner,

S. CT. CASE NO. SC02-14

vs.

DCA CASE NO. 5D01-873

STATE OF FLORIDA,

Respondent.

_____ /

**ON DISCRETIONARY REVIEW FROM THE
DISTRICT COURT OF APPEAL, FIFTH DISTRICT,
AND THE NINTH JUDICIAL CIRCUIT IN AND FOR
ORANGE COUNTY, FLORIDA**

PETITIONER'S INITIAL BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

The Petitioner, Travis Trotter, was originally charged, in an information filed on February 14, 1997, with trafficking in 28 grams or more of cocaine. (R 9-11) Petitioner entered a no contest plea to the instant offense on November 3, 1999, and received a sentence of 83.2 months incarceration without the trial court enhancing the Petitioner's total sentencing guidelines point total by the 1.5 Trafficking multiplier. (R 21) The Petitioner timely appealed that sentence and the Fifth District Appellate Court issued a mandate, dated January 24, 2001, which ordered that the Petitioner be resentenced according to Heggs v. State, 759 So. 2d 620 (Fla. 2000). (R 19-22)

The Petitioner was resentenced in a Heggs resentencing hearing on March 5,

2001, by Circuit Court Judge R. James Stroker. The Petitioner received a sentence of 72 months incarceration, which included the sentencing enhancement of the trial court's assessment of a 1.5 Trafficking multiplier over defense counsel's objection. (R 6, 35-36)

The Petitioner timely filed a notice of appeal of his new sentence under Heggs to the Fifth District Appellate Court on March 13, 2001. (R 38) The Office of the Public Defender was appointed to represent the Petitioner in this appeal on March 5, 2001. (R 33)

The Fifth District Appellate Court affirmed the Petitioner's Heggs sentence and held that the trial court could assess, at the Petitioner's de nova resentencing under Heggs, the 1.5 Trafficking multiplier. The Fifth District also certified conflict with the decision of the Second District Appellate Court in Estrada v. State, 787 So. 2d 94 (Fla. 2d DCA 2001). The Second District Appellate Court held in Estrada that the 1.5 Trafficking multiplier could not be imposed by the trial court during a defendant's Heggs resentencing without violating the constitutional guarantees of due process and to not be held in double jeopardy for the same offense since the trial court did not impose the 1.5 Trafficking multiplier at Mr. Estrada's original sentencing hearing.

Petitioner filed a notice to invoke the discretionary jurisdiction of this Court

on December 26, 2001. This Court issued an order dated January 9, 2002, postponing a decision on jurisdiction in this case and set a briefing schedule.

SUMMARY OF THE ARGUMENT

The Fifth District Appellate Court erroneously held that the trial court could resentence the Petitioner in this case, under Heggs v. State, 759 So. 2d 620 (Fla. 2000), based on a revised sentencing guidelines scoresheet that includes the trial court's assessment of a 1.5 Trafficking multiplier for the first time. Specifically, the trial court erroneously held that there was no abuse of discretion by the trial court imposing the 1.5 Trafficking multiplier on the Petitioner's "revised" 1994 Heggs guidelines scoresheet, even though the trial court directly exercised its discretion not to impose the same 1.5 Trafficking multiplier at the Petitioner's original guidelines sentencing hearing. Petitioner would submit, however, as explained by the Second District Appellate Court in Estrada v. State, 787 So. 2d 94 (Fla. 2d DCA 2001), that the trial court may not subsequently assess a 1.5 Trafficking multiplier during a Heggs resentencing when the trial court specifically chose not to impose the same 1.5 Trafficking multiplier at the Petitioner's original sentencing. Such an enhancement to the Petitioner's sentence is violative of due process under the Fourteenth Amendment to the United States Constitution and the guarantee against being placed in double jeopardy under the Fifth Amendment to the United States Constitution. As cogently pointed out by Judge Patterson in the panel decision of Estrada, this is because the Petitioner is being sentenced "for

precisely the same conduct” which he was originally sentenced and the Petitioner is not being rewarded because of any mistake or error he perpetrated. Nor was the Petitioner being sentenced for violating his probation. Accordingly, the 1.5 Trafficking multiplier sentencing enhancement, subsequently assessed below by the trial court on the Petitioner’s “revised” 1994 sentencing guidelines scoresheet during Petitioner’s Heggs resentencing, was erroneously affirmed by the Fifth District Appellate Court. The decision on appeal before this Court rendered by the Fifth District, should, therefore, be quashed and this case should be remanded to the trial court for resentencing based on a 1994 revised sentencing guidelines scoresheet that does not include the assessment of the 1.5 Trafficking multiplier sentencing enhancement.

ISSUE

THE DECISION OF THE FIFTH DISTRICT APPELLATE COURT ERRONEOUSLY AFFIRMED THE TRIAL COURT'S ASSESSMENT OF THE 1.5 TRAFFICKING MULTIPLIER UPON THE PETITIONER BEING RESENTENCED ACCORDING TO HEGGS V. STATE, 759 So.2d 620 (Fla. 2000)

The Petitioner was originally sentenced for the instant trafficking offense to 83.2 months incarceration on November 3, 1999, before Circuit Judge R. James Stroker. (R 12-13, 20) The Petitioner appealed his sentence and the Fifth District Appellate Court in Trotter v. State, 774 So. 2d 924 (Fla. 5th DCA 2001), issued a mandate, dated January 29, 2001, ordering that Petitioner be resentenced according to Heggs v. State, 759 So. 2d 620 (Fla. 2000). (R 19-23)

The Petitioner's Heggs resentencing hearing was held on March 5, 2001, before Circuit Court Judge R. James Stroker. (R 1-8) During the resentencing hearing, the prosecutor requested that the trial court exercise its discretion and impose a 1.5 multiplier for a trafficking offense on the Petitioner's revised Heggs guidelines scoresheet, which would yield a guidelines sentencing range of between 64.10 and 80.125 months incarceration. Without the 1.5 Trafficking multiplier assessment by the trial court, the Petitioner's guidelines sentencing range would be between 33.4 and 41.75 months incarceration. (R 2-4) See Rule 3.702(d)(14), Florida Rules of Criminal Procedure. (R 49-51) Defense counsel objected and

reminded the trial court that the trial court had not exercised its discretion to impose the 1.5 Trafficking multiplier enhancement on the Petitioner's original guidelines scoresheet prepared at the Petitioner's original sentencing hearing on November 3, 1999. (R 2-3, 14-16) The trial court overruled defense counsel's objection to the 1.5 Trafficking multiplier and found that, because the trial court had the possibility of imposing the 1.5 multiplier for a drug trafficking offense at the time of the Petitioner's original November 3, 1999, sentencing hearing, the trial court could subsequently exercise its discretion and impose the 1.5 Trafficking multiplier upon the Petitioner being resentenced according to Heggs. (R 6) The Petitioner received a "revised" guidelines sentence, increased by the Trafficking 1.5 multiplier enhancement, of 72 months incarceration. (R 6, 35-36)

The same exact situation developed in a recent Second District Court of Appeal's decision, namely, Estrada v. State, 787 So. 2d 94 (Fla. 2d DCA 2001). In Estrada, the Second DCA held that the trial court may not exercise its discretion and impose the 1.5 Trafficking multiplier enhancement on a defendant's scoresheet during a resentencing hearing under Heggs when the trial court did not exercise its discretion and impose the 1.5 Trafficking multiplier at the defendant's original sentencing hearing. As the Second District Court of Appeal pointed out in Estrada, the Florida Supreme Court's decision in Roberts v. State, 644 So.2d 81 (Fla. 1994),

does not authorize a trial court, in correcting a sentence, to add a discretionary multiplier that it originally declined to impose. The Second District also pointed out in Estrada, supra, this Court's decision in Roberts, supra, clearly holds that double jeopardy concerns arise when a trial court exercises its discretion, upon a resentencing hearing, to impose a greater, sentence than what the trial court had originally intended to impose at the defendant's original sentencing hearing.

In the instant case, the trial court clearly exercised its discretion at the Petitioner's original sentencing hearing to not impose the 1.5 Trafficking multiplier. This is particularly borne out by the fact that that the 1.5 Trafficking multiplier provision was crossed out on the Petitioner's original guidelines scoresheet which calculated the Petitioner's guidelines sentencing range. (R 15) Simply because the Petitioner became, subsequent to his original sentencing hearing, entitled to a Heggs, supra, resentencing hearing, does not entitle the trial court to then exercise its discretion and impose the 1.5 Trafficking multiplier on the Petitioner's corrected guidelines scoresheet at the March 5, 2001 resentencing hearing.

This should be contrasted, as also pointed out in the Estrada decision, with a situation where a defendant's guidelines scoresheet is being corrected after a

violation of probation hearing. Nor was the 1.5 Trafficking multiplier mistakenly omitted by the trial court from the Petitioner's original guidelines scoresheet. Simply put, the Petitioner was merely being resentenced for "precisely the same conduct" for which he was originally sentenced. The trial court may not now, upon a Heggs resentencing hearing, to which the Petitioner was fully entitled to, choose to exercise its discretion and impose the 1.5 Trafficking multiplier when it is undisputed the trial court did not intend to impose the 1.5 Trafficking multiplier at the Petitioner's original sentencing hearing.

In the Fifth District Appellate Court's subsequent decision in this case, Trotter v. State, 27 Fla. L. Weekly D 14 (Fla. 5th DCA December 21, 2001) (Trotter II), the Fifth District applied a de nova standard of appellate review as outlined in St. Lawrence v. State, 785 So. 2d 728 (Fla. 5th DCA 2001), and June v. State, 784 So. 2d 1257 (Fla. 5th DCA 2001). The Fifth District erroneously concluded, however, that when the trial court conducts a de nova Heggs resentencing hearing, the trial court may "revisit" its original decision not to impose the 1.5 Trafficking multiplier at the Petitioner's original sentencing hearing, without running afoul of any double jeopardy concerns under the Fifth Amendment to the United States Constitution or due process concerns under the Fourteenth Amendments to the United States Constitution under North

Carolina v. Pearce, 395 U.S. 711 (1969) as a vindictive sentence. The Fifth District acknowledged, in footnote 1, on page 730, in St. Lawrence, supra, that “[t]he ability of a party to raise issues at resentencing is not unlimited [under][t]he law of the case doctrine [which] applies wherein a party seeks to re-litigate a specific issue which has been already raised and decided on the merits by an appellate court.” [citation omitted] Clearly then, since the record sub judice is undisputed that the trial court specifically exercised its discretion and chose not to enhance the Petitioner’s sentencing guidelines range by the 1.5 Trafficking multiplier at the Petitioner’s original sentencing hearing, that specific determination by the trial court cannot be erased simply because the Petitioner subsequently stood before the same trial court in a de nova setting to be resentenced under Heggs, supra.

The Fifth District in Trotter (II), additionally misconstrues the Second District’s reliance on Kingsley v. State, 682 So. 2d 641 (Fla. 5th DCA 1996). The real issue in Kingsley was not whether victim injury points could be added onto Mr. Kingsley’s guidelines sentencing scoresheet, after he violated his probation. Rather, it was whether the victim injury points could be increased by the trial court from slight to severe at his probation revocation sentencing hearing when the trial court had already determined, at his original sentencing hearing, that only a slight victim injury had occurred.

In the case at bar, the Petitioner had not violated his probation at the time of his Heggs resentencing hearing as occurred in Roberts v. State, 644 So. 2d 81 (Fla. 1994). Nor was Petitioner resentenced under Heggs based on any mistaken interpretation by trial court as to whether the trial could have originally imposed a sentencing enhancement such as a habitual felony offender or the 1.5 Trafficking multiplier. As this Court clearly explained in Harris v. State, 645 So. 2d 386, 388 (Fla. 1994), the trial court in that case “. . . would have originally sentenced Harris as a habitual offender but for the uncertainty. . .” [citation omitted] existing in the Florida sentencing law at the time when Harris’ original sentence was imposed. There was simply no such misunderstanding held by the trial court during the Petitioner’s original sentencing hearing as to whether the trial court could lawfully enhance the Petitioner’s guidelines sentencing point total by the 1.5 Trafficking multiplier. In fact, the trial court directly and unequivocally chose not to assess the 1.5 Trafficking multiplier. The Petitioner had, therefore, at the beginning of his Heggs resentencing hearing, an expectation of finality that he would not later be subjected again to this particular sentencing enhancement of a 1.5 Trafficking multiplier, which the trial court had originally not imposed.

In sum, the imposition of the 1.5 Trafficking multiplier on the Petitioner’s corrected scoresheet drastically increased the Petitioner’s total sentencing points

from 61.4 to 92.1 in violation of well established principles of substantive due process and constitutional guarantees against double jeopardy. (R 26) As noted by the Fifth District in its original (Trotter I) opinion ordering the Heggs resentencing hearing in Petitioner's initial appeal, the Petitioner could only be sentenced under the corrected guidelines scoresheet to a maximum of 41.75 months incarceration, absent the trial court imposing a lawful departure sentence. (R 21-22, 25-26) Accordingly, this Court should quash the instant decision rendered by the Fifth District in Trotter (II) and remand this case for resentencing, based on a properly corrected guidelines scoresheet that does not include the discretionary 1.5 Trafficking multiplier, yielding a maximum possible guidelines sentence to be imposed of 41.75 months incarceration.

CONCLUSION

Based upon the foregoing arguments and authorities, Petitioner respectfully requests this Honorable Court to quash the decision of the Fifth District in this appeal (Trotter II), vacate the Petitioner's sentence, and, remand this case for resentencing in accordance with a correct guidelines scoresheet, in conformity with Heggs v. State, 759 So. 2d 620 (Fla. 2000), without the inclusion of a 1.5 multiplier for a trafficking offense.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand delivered to the Honorable Robert A. Butterworth, Attorney General, 444 Seabreeze Boulevard, 5th Floor, Daytona Beach, Florida 32118, via his basket at the Fifth District Court of Appeal and mailed to Travis A. Trotter, DOC #190010, Gulf Correctional Institution, 500 Ike Steel Road, Wewahitichka, FL 32465, on this 4th day of February, 2002.

SUSAN A. FAGAN
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CERTIFICATE OF FONT

I HEREBY CERTIFY that the size and style of type used in the brief is 14 point proportionally spaced Times New Roman.

SUSAN A. FAGAN
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