IN THE SUPREME COURT OF FLORIDA

CHARLES MENDENHALL,

Petitioner,

v. Case No. SC09-400

STATE OF FLORIDA,

Respondent.
______________________________/

ON DISCRETIONARY REVIEW FROM
THE FIFTH DISTRICT COURT OF APPEAL

MERITS BRIEF OF RESPONDENT

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STATEMENT OF THE CASE AND FACTS

The State generally accepts Mendenhall's statement of the case and facts but restates and adds the following:

Mendenhall was charged with attempted first degree murder with a firearm. (Vol. I, R. 10-11). The information alleged that Mendenhall discharged a firearm, and as a result, inflicted great bodily harm upon the victim, Russell William Gay. (Vol. I, R. 10). A jury convicted Mendenhall of the lesser included attempted second degree murder with a firearm. (Vol. II, R. 212). Mendenhall was sentenced to thirty-five years, with a thirty-five year minimum mandatory. (Vol. II, R. 223-225).

Following the filing of his notice of appeal, Mendenhall filed a motion pursuant to Florida Rule of Criminal Procedure 3.800(b)(2), later amended, in which he urged, inter alia that his sentence was illegal in that it exceeded that provided by law for the offense of which he was convicted. (Vol. VI, R. 248-251). On October 3, 2007, a hearing was held on the motion. (Vol. VII, T. 291-319). Mendenhall argued that if the minimum mandatory provisions of the 10/20/Life statute applied to him, he could be sentenced to no more than thirty years, with a twenty-five year mandatory minimum. Mendenhall reasoned that the maximum for the offense of which he was convicted, attempted second degree murder, normally a second degree felony, was reclassified to a first degree

felony pursuant to section 775.087(1)(b) and thus carried a penalty not to exceed thirty years. (Vol. VII, T. 303). Mendenhall urged that the provisions of section 775.087(2)(c) limited the mandatory minimum to the greater of the penalty provided in section 775.082, section 775.084, or the Criminal Punishment Code portions of Chapter 921. He concluded that since section 775.082 provided that a second degree felony, attempted second degree murder, was punishable by not more than fifteen years, then section 775.087 (2)(c) required the mandatory minimum to be twenty-five years. (Vol. VII, T. 303-304).

The trial court accepted Mendenhall's argument that section 775.087(2)(c) limited the maximum penalty for attempted second degree murder to that provided in sections 775.082 and 775.084 or to that provided in the Criminal Punishment Code provisions in chapter 921. The trial court then found that attempted second degree murder, a first degree felony after reclassification under section 775.087(1)(b), carried a maximum penalty of thirty years, and that section 775.087(2)(a)3 allowed only a twenty-five year minimum mandatory. (Vol. VII, T. 314). Accordingly, the trial court vacated Mendenhall's original sentence, and resentenced him to thirty years, with a twenty-five year mandatory minimum. (Vol. VII, T. 314). The State objected and filed a notice of cross-appeal of this sentence to the Fifth District Court of Appeal. (Vol. VII. T. 314).

Citing to this Court's decision in Sanders v. State, 944 So.2d

203, 205 (Fla. 2006) and to the 10/20/Life statute, section 775.087, the Fifth District Court of Appeal reversed Mendenhall's sentence:

> On cross-appeal, the State challenges the defendant's reduced sentence, arguing that the trial court erred when it interpreted section 775.087 of the Florida Statutes as prohibiting it from imposing a sentence in excess of 30 years and a mandatory minimum in excess of 25 years. We agree. Our review of cases which have similar facts to those presented here leads us to conclude that the trial court's original sentence of 35 years' imprisonment, with a 35-year mandatory minimum, was legal.

See Mendenhall v. State, 999 So.2d 665, 668-669 (Fla. 5th DCA 2008).

SUMMARY OF ARGUMENT

The district court of appeal properly affirmed Mendenhall’s thirty-five year sentence pursuant to the 10/20/Life Statute, section 775.087(2)(a)3 of the Florida Statutes (2004), predicated upon his discharge of a firearm causing great bodily harm. The statute plainly mandates that defendants who qualify for sentencing under this provision of the 10/20/Life statute are subject to a minimum term of imprisonment ranging from twenty-five years to life. The district court correctly concluded that Mendenhall’s sentence was not subject to a cap of thirty years under the plain language and stated legislative intent of this expansive sentencing scheme enacted to ensure that defendants who commit crimes with firearms be punished to the fullest extent of the law.

ARGUMENT

MENDENHALL WAS LAWFULLY SENTENCED TO THIRTY-FIVE YEARS IMPRISONMENT UNDER THE 10/20/LIFE STATUTE.

At issue before this Court is what term of imprisonment a trial court may impose for a defendant being sentenced for a first degree felony who discharged a firearm and caused death or great bodily harm under the dictates of the 10/20/Life statute, section 775.087(2) of the Florida Statutes (2004). In the instant case, Mendenhall was sentenced to a mandatory minimum term of thirty-five years imprisonment pursuant to section 775.087(2)(a)3 of the 10/20/Life statute. Upholding this sentence, the Fifth District Court of Appeal determined that by applying section 775.087(2)(a)3, an offender may be sentenced to a mandatory term ranging from twenty-five years imprisonment up to life. See Mendenhall, 999 So.2d at 668-669.[1]

Mendenhall now claims that the trial court was precluded from sentencing to him to anything beyond the statutory maximum of thirty years with a twenty-five year minimum mandatory term. In doing so, he relies upon cases from the First, Second, and Fourth District Courts of Appeal. See Wilson v. State, 898 So.2d 191 (Fla. 1st DCA 2005); Sousa v. State, 976 So.2d 639 (Fla. 2d DCA 2008); and Collazo v. State, 966 So.2d 429 (Fla. 4th DCA 2007)(en banc). Respondent counters that a plain reading of the 10/20/Life

1 The Fifth District Court of Appeal has followed Mendenhall in Booth v. State, 34 Fla. L. Weekly D1901 (Fla. 5th DCA September 18, 2009), rev. pending, Case No. SC09-1832 (Fla. 2009).

statute demonstrates that the trial court properly imposed a thirty-five year sentence in this case, and that Mendenhall's contention that his sentence had to be limited to a maximum term of thirty years runs counter to the plain language and underlying purpose of the 10/20/Life statute.

The 10/20/Life sentencing scheme provides that a defendant who possesses a firearm during the commission of certain enumerated offenses shall be sentenced to a minimum term of imprisonment of ten years. See section 775.087(2)(a)1. A defendant who discharges that firearm during the commission of those certain enumerated offenses shall be sentenced to a minimum term of imprisonment of twenty years. See section 775.087(1)(a)2. As applied in the instant case, the statute further provides that if, during the course of the commission the firearm is discharged and as a result of that discharge death or great bodily harm is inflicted upon any person, "the convicted person shall be sentenced to a minimum term of imprisonment of not less than 25 years and not more than a term of imprisonment of life in prison." See section 775.087(1)(a)3.

One of the most fundamental tenets of statutory construction requires that we give statutory language its plain and ordinary meaning, unless words are defined in the statute or by the clear intent of the legislature." Raulerson v. State, 763 So.2d 285, 291 (Fla. 2000)(quoting Green v. State, 604 So.2d 471, 473 (Fla. 1992)). When construing a statutory provision, legislative intent is the polestar that guides the inquiry of this Court.

> When the language of the statute is clear and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory interpretation and construction; the statute must be given its plain and obvious meaning.

McLaughlin v. State, 721 So.2d 1170, 1172 (Fla. 1998)(quoting Holly v. Auld, 450 So.2d 217, 219 (Fla. 1984)(citations omitted)). See also Saleeby v. Rocky Elson Construction, Inc., 3 So.3d 1078, 1082 (Fla. 2009). Courts must read a statute as written for to do otherwise would constitute an abrogation of legislative power. Nicoll v. Baker, 668 So.2d 989, 991 (Fla. 1996).

A plain reading of section 775.087(2)(a)3 requires a trial judge to sentence a defendant who has discharged a firearm and caused death or great bodily harm to a minimum term of imprisonment to not less than twenty-five years and not more than life. The precise length of the mandatory minimum portion of that sentence is a discretionary sentencing decision of the trial court. See Brazill v. State, 845 So.2d 282, 292 (Fla. 4th DCA 2003)(upholding the defendant's sentence of twenty-eight years for second degree murder where defendant discharged a firearm and caused death, noting, "A plain reading of section 775.087(2)(a)3 indicates that the minimum term that may be imposed ranges from twenty-five years to life imprisonment".), rev. denied, 876 So.2d 561 (Fla. 2004). Thus, a sentencing judge must sentence a defendant anywhere within that range with the mandatory lowest term being twenty-five years and a mandatory maximum term of life. See id.

This Court, in answering a certified question from the Second

District Court of Appeal regarding lesser included offenses, has likewise stated:

> On appeal, Sanders alleged that he was entitled to a new trial, arguing that the lesser included offense of which the jury found him guilty was not a true lesser included offense because the penalty imposed was not less than the penalty for the main offense charged. Id. The maximum sentence for the core offense of attempted first-degree murder is thirty years, while the sentence for attempted second-degree murder without any enhancements is fifteen years. However, with the application of the ten-twenty-life statute, the resulting maximum sentence for both attempted first- and second-degree murder while discharging a firearm and inflicting great bodily harm is the same-life.

Sanders v. State, 944 So.2d 203, 205 (Fla. 2006)(emphasis added)(citing Sanders v. State, 912 So.2d 1286, 1288 (Fla. 2d DCA 2005). The Third District Court of Appeal has also upheld the imposition of a mandatory minimum term of life imprisonment, noting, "When the ten-twenty-life statute is read as a whole, the statute expressly characterizes these sentences as mandatory minimum terms of imprisonment." Brown v. State, 843 So.2d 930, 931 (Fla. 3d DCA), rev. denied, 853 So.2d 1070 (Fla. 2003). Given the express legislative intent that mandatory minimum terms be imposed under the 10/20/Life statute, "It follows that it was permissible for the trial court to impose a sentence of life imprisonment with a mandatory minimum sentence of life." Id. at 931-932. With regard to the plain statutory language, Judge Farmer noted in dissent in Collazo v. State, 966 So.2d 429, 433 (Fla. 4th DCA 2007):

> The majority seem to read into the provision a punctuation mark after the words 25 years. There is no

> mark at that point; the clause presses on without any break. Then the words not less than 25 years are followed immediately by the conjunction and which is not preceded by a comma, semi-colon or period. If there had been some such punctuation, one might conceivably read the sentence as containing two separate thoughts: (1) a mandatory period of 25 years; (2) discretion to make the total sentence life. As actually written and punctuated, however, the plain meaning is to conjoin not less than 25 years with the words not more than a term of life into a single thought. As thus written, the mandatory period can be anything from life down to 25 years. I see nothing unclear about this-nothing ambiguous-on which to invoke the rule of lenity.

Collazo, 966 So.2d at 433-434 (Farmer, J., dissenting).

Respondent submits that the 10/20/Life statute is its own self-contained sentencing scheme that creates minimum terms for possession or the use of firearms during the commission of those offenses enumerated therein. The basis for the creation of these new sentences for offenses involving firearms, particularly the minimum sentencing ranges created by offenders who discharge firearms and kill or cause great bodily harm, has been noted by this Court. See McDonald v. State, 957 So.2d 605 (Fla. 2007).

> . . . [T]he Legislature has very clearly mandated that it is the policy of this State to deter the criminal use of firearms. This mandate is underscored by the widespread promulgation of the 10-20-LIFE law beyond mere statutory notice, through television commercials, posters, and other forms of advertising. This policy is further underscored by the statement of legislative intent in section 775.087, which was added in 1999, see ch. 99-12, § 1, at 538-42, Laws of Fla., and the accompanying increase to the mandatory minimum sentence under section 775.087 from three years for all crimes to ten years for all crimes except aggravated assault, possession of a firearm, or burglary. Id. In making these changes, the Legislature made the following extensive findings:
>
> > WHEREAS, Florida ranks among the most violent states in the nation, and

WHEREAS, in 1975 the Florida Legislature enacted legislation requiring a minimum mandatory sentence of three years in prison for possessing a gun during the commission or attempted commission of a violent felony, and

WHEREAS, the Legislature enacted this mandatory penalty in order to protect citizens from criminals who are known to use guns during the commission of violent crimes, and

WHEREAS, the FBI reports that among persons identified in the felonious killings of law enforcement officers in 1997, 71% had prior criminal convictions, and one of every four were on probation or parole for other crimes when they killed the officers, and

WHEREAS, criminals who use guns during the commission of violent crimes pose an increased danger to the lives, health, and safety of Florida's citizens and to Florida's law enforcement officers who daily put their lives on the line to protect citizens from violent criminals, and

WHEREAS, the Legislature intends to hold criminals more accountable for their crimes, and intends for criminals who use guns to commit violent crimes to receive greater criminal penalties than they do today, and

WHEREAS, the Legislature intends that when law enforcement officers put themselves in harm's way to apprehend and arrest these gun-wielding criminals who terrorize the streets and neighborhoods of Florida, that these criminals be sentenced to longer mandatory prison terms than provided in current law, so that these offenders cannot again endanger law enforcement officers and the public, and

WHEREAS, there is a critical need for effective criminal justice measures that will ensure that violent criminals are sentenced to prison terms that will effectively incapacitate the offender, prevent future crimes, and reduce violent crime rates, and

WHEREAS, it is the intent of the Legislature that criminals who use guns to commit violent crimes be vigorously prosecuted and that the state demand that

> minimum mandatory terms of imprisonment be imposed pursuant to this act . . .
>
> Ch. 99-12, at 537-38, Laws of Fla. Because the Legislature clearly intends that criminals using firearms to commit violent crimes receive the maximum sentence, the mandatory minimum 10-20-LIFE sentence must be imposed even if it is less than another sentence that runs concurrently.

McDonald, 957 So.2d at 611-612.

The difficulty that has arisen in the district courts regarding the application of section 775.087(2)(a)3 comes from the fact that for those enumerated offenses where death or great bodily harm ensue from the discharge of the firearm, the statute creates a sentencing range of twenty-five years to life. The district court decisions that Mendenhall relies upon as being in conflict seem to be uneasy in the conclusion that the 10/20/Life statute creates new statutory mandatory minimum terms for offenses committed with firearms. As a result, these district courts have looked to sections 775.087(2)(c) and 775.082 as means to limit the sentences that can be imposed. See Collazo, 966 So.2d at 431; Sousa, 976 So.2d at 640-641); and Wilson, 898 So.2d at 192-193.

For instance, and notwithstanding the plain intent of the 10/20/Life statute as an expansive, more severe sentencing structure for offenders who choose to use guns to commit crimes, the Fourth District Court of Appeal utilized sections 775.087(2)(c) and section 775.082(3)(c) to restrict the sentence imposed for the second degree felony of third-degree murder caused by the discharge of the firearm. See Collazo, 966 So.2d at 431. While

acknowledging that the defendant was subject to a "minimum mandatory enhancement of twenty-five years to life," the district court concluded that because the defendant was convicted of a second degree felony which carried a statutory maximum of only fifteen years, under section 775.087(2)(c), the appellate court determined that the trial court could only impose "that minimum mandatory [term of twenty-five years]." Id.

Without any analysis, in Wilson and Sousa, the First and Second District Courts of Appeal reversed the imposition of sentences beyond the statutory maximum of thirty years but upheld the imposition of a mandatory term of twenty-five years pursuant to the 10/20/Life statute. In doing so, neither district court considered the application of section 775.087(2)(c), but simply relied upon section 775.082 to conclude that the defendant could not be sentenced to more than thirty years, the statutory maximum under section 775.082(3)(b), but that the imposition of the twenty-five minimum mandatory terms could remain intact. Sousa, 976 So.2d at 640-641 and Wilson, 898 So.2d at 192-193. See also Brown v. State, 983 So.2d 706 (Fla. 5th DCA 2008) and Yasin v. State, 896 So.2d 875 (Fla. 5th DCA 2005).

Section 775.087(2)(c) provides:

> If the minimum mandatory terms of imprisonment imposed pursuant to this section exceed the maximum sentences authorized by s. 775.082, s. 775.084, or the Criminal Punishment Code under chapter 921, then the mandatory minimum term must be imposed. If the mandatory minimum terms of imprisonment pursuant to this section are less than the sentences that could be imposed as authorized by s. 775.082, s. 775.084, or the Criminal Punishment Code

> <u>under chapter 921, then the sentence imposed by the court must include the mandatory minimum term of imprisonment as required in this section</u>.

(Emphasis added). This section was simply misapplied in <u>Collazo</u> and now by Mendenhall in his argument to this Court in instances where a defendant is subject to the range of twenty-five years to life under subsection 775.087(2)(a)3.

For example, had Mendenhall only possessed the firearm, there is no question he would be subject to a minimum term of ten years but under the highlighted portion of section 775.087(2)(c), he could receive an overall sentence of thirty years. Had Mendenhall discharged the firearm, he would be subject to a minimum term of twenty years, but again he could receive an overall sentence of thirty years. Here, Mendenhall discharged the firearm and caused great bodily harm. This subjected him to a range of twenty-five years to life imprisonment. Thus, the second sentence of section 775.087(2)(c) does not come into play when an offender, in committing a first degree felony, discharges the firearm and causes great bodily harm as in the instant case. Under the plain language of the statute, that offender is subject to a minimum mandatory term ranging from twenty-five years to life imprisonment. The trial court has to sentence the defendant to at least twenty-five years, but can impose a sentence up to life imprisonment under section 775.087(2)(a)3.

The trial court is not bound by a statutory maximum of thirty years for a first degree felony because the statutory maximum for

this offense, under section 775.087(2)(a)3, is now life imprisonment. Moreover, since a twenty-five year term will always have to be imposed when there is death or great bodily harm, the second sentence of 775.087(2)(c) is merely redundant to the minimum term dictated under section 775.087(2)(a)3. A sentence of up to life, with a twenty-five year minimum mandatory, will never be less than the statutory maximum for a first degree felony. The district court in Collazo and those cases following Collazo[2] have misapplied the second sentence of section 775.087(2)(c) to limit the maximum sentence that can be imposed, when, in fact, it is not applicable where the language of section 775.087(2)(a)3 specifically increases it.[3]

The clarity and the unambiguous directive of this expansive sentencing scheme for firearm offenses should not been ignored, confused or restricted when read in conjunction with section 775.087(2)(c). The statute emphatically provides so:

> It is the intent of the Legislature that offender who actually possess, carry, display, use, threaten to use,

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2 See Johnson v. State, 17 So.3d 847 (Fla. 4th DCA 2009); Thurston v. State, 984 So.2d 1290 (Fla. 4th DCA 2008) and Leary v. State, 980 So.2d 622 (Fla. 4th DCA 2008). Cf. also Hoover v. State, 877 So.2d 751 (Fla. 1st DCA 2004).

3 Mendenhall also argues that because his conviction for attempted second degree murder was reclassified under section 775.087(1) to a first degree felony, not a first degree felony punishable by life, this also precludes his sentence from exceeding the statutory maximum of thirty years. This reclassification is of no moment as section 775.087(2)(a)3 controls what the maximum sentence is for those offenses committed with either possession, discharge, or discharge and death/great bodily harm of a firearm. The length of the mandatory minimum term does not depend on how the felony is classified.

> or attempt to use firearms or destructive devices be punished to the fullest extent of the law, and the minimum terms of imprisonment imposed pursuant to this subsection shall be imposed for each qualifying felony count for which the person is convicted.

See section 775.087(2)(d), Flat. Stat. (2004). Even though a statute is penal in nature and any ambiguity should generally be resolved in favor of the accused,

> the primary and overriding consideration in statutory interpretation is that a statute could be construed and applied as to give effect to the evident intent of the legislature regardless of whether such construction varies from the statute's literal meaning. In other words, criminal statutes are not to be so strictly construed as to emasculate the statute and defeat the obvious intent of the legislature.

Deason v. Florida Dep't of Corrections, 705 So.2d 1374, 1375 (Fla. 1998).

The district courts in Collazo, Wilson, and Sousa seemingly ignore the well-documented purpose of the 10/20/Life statute and apply differing provisions of the statute to reach a result that runs counter to its plain language and intent, to punish gun wielding offenders to the fullest extent of the law. To accept Mendenhall's argument that his sentence is to be capped at thirty years, this Court would be eroding the very basis for the enactment of the 10/20/Life statute. See McDonald, 957 So.2d at 611-612; section 775.087(2)(d).

> We should not lose sight of the obvious policy behind this provision. The use and discharge of firearms to commit crimes is the most grievous of all sins against the peace of civil society. In fact, civil society was created to protect its members from such violence. While all killing is bad, there is a sinister facet about

killing with guns.

See Collazo, 966 So.2d at 433-434 (Farmer, J., dissenting).

In all, Respondent submits that the Fifth District Court of Appeal correctly determined that under section 775.087(2)(a)3, the trial judge has the discretion to impose a mandatory minimum term of imprisonment ranging from twenty-five years to life imprisonment when the defendant discharges a firearm and causes death or great bodily injury when committing the enumerated offenses set forth under the statute. To conclude otherwise would limit the restrict those sentences to be imposed under the 10/20/Life intent in contravention of its plain language and stated intent to punish criminal who commit certain crimes with firearms to the fullest extent of the law. The ruling of the district court of appeal should be affirmed and the contrary conclusions reached by the Fourth District Court of Appeal in Collazo, the Second District Court of Appeal in Sousa, and the First District of Appeal in Wilson should be rejected by this Court.

CONCLUSION

Based on the foregoing argument and authority, the State respectfully requests that this Court affirm the decision of Mendenhall v. State, 999 So.2d 665 (Fla. 5th DCA 2008) in all respects.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing merits brief has been furnished by delivery to Assistant Public Defender Meghan Ann Collins, counsel for Mendenhall, 444 Seabreeze Boulevard, Suite 210, Daytona Beach, Florida 32118, this _____ day of November, 2009.

CERTIFICATE OF COMPLIANCE

The undersigned counsel certifies that this brief was typed using 12 point Courier New, a font that is not proportionately spaced.

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