

IN THE SUPREME COURT OF FLORIDA

DILAR S. BOOKER,  
Petitioner,

v.

CASE NO. 68,400

STATE OF FLORIDA,  
Respondent.

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DISCRETIONARY REVIEW OF DECISION OF THE DISTRICT  
COURT OF APPEAL, SECOND DISTRICT OF FLORIDA

SUPPLEMENTAL BRIEF OF RESPONDENT'S ON JURISDICTION

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## SUMMARY OF THE ARGUMENT

Prior the enactment of the Sentencing Guidelines, Florida courts did not review sentencing decisions except to determine if they were lawfully imposed and within the statutory limits of an otherwise valid statute. In determining whether a sentence had been lawfully imposed, the courts looked to matters like whether an enhancement statute had been properly employed or whether credit for time served was due the offender and if so how it was to be calculated.

Section one Chapter 86-273 of the laws of Florida limited the scope of the appellate remedy granted by the sentencing guidelines law. It deprived the district courts of jurisdiction to review the extent of departure. This is a valid exercise of the legislature's power. This court has determined that appellate jurisdiction of the district courts flows from statutory enactment not from the constitution itself. Further, appeals are remedies. And, remedies are substantive for separation of powers purposes and hence within the province of the legislature to define.

Petitioner's arguments to the contrary are without merit. They overlook and fail to consider the true source of appellate power under the constitution, the legislature. The references to the cases and arguments contained therein either misread the decisions on which they rest or those decisions simply have no application to the questions presented by the facts of this case.

This court's jurisdiction to entertain this case rests on the district court's certification of a question to it. That jurisdiction has now evaporated because the question is no longer meaningful, the district court having lost the power to review the extent of departure. Hence, there is no meaningful answer to the district court's question. Accordingly, this court finds itself in a situation where it can not give effect to any order it might issue in response to the certified question short of first ruling Section one of Ch 86-723 Laws of Florida unconstitutional on separation of powers grounds.

The language and cases cited in support of this court's jurisdiction simply do not address the question presented by the facts of this case. Of course, departments of government have the power to accomplish all objects naturally within that department. But, deciding on the scope of jurisdiction is a function of the legislative branch of our government under our current constitution. And this is not a case where the legislature has sought to deprive this court of jurisdiction conferred on it by the constitution. Rather, this is a case where a limitation on the district court's jurisdiction has the incidental effect of destroying the jurisdictional basis for this court to entertain petitioner's claims.

This case can not be resolved without reference to the constitutional claims raised by petitioner. To reach the merits of the certified question, this court must find that

Section one, Chapter 86-273 invalid on the basis of the separation of powers claims advanced by petitioner.

Rather than follow the customary format of stating the issues and then following that with a discussion of the issue, this brief deals with the two matters identified in this court's order of December 3, 1986 under separate headings addressing the issues so identified. There are also third and fourth headings. They address arguments in petitioner's brief related to but not identified in this court's order.

#### JUDICIAL REVIEW OF SENTENCING

Death sentencing aside, prior to the enactment of Florida's Sentencing Guidelines law, Section 921.001, Florida Statutes (1985) judicial review of sentencing was confined to determining whether the sentence was lawful and imposed in a lawful manner. In determining whether the sentence was lawful, the courts looked to whether it was lawful in the sense that it did not exceed the statutory maximum and whether the statute pursuant to which it was imposed was constitutionally valid. Two cases cited in petitioner's brief illustrate this aspect of judicial review of sentencing in Florida. Brown v. State, 152 Fla. 152 853, 13 So.2d 458 (1943)(looking to lawfulness of statute in terms of whether possible punishment cruel and unusual) and Infante v. State, 197 So.2d 542 (Fla. 3d DCA 1967)(noting absence of power to review sentence within otherwise lawful statutory limits). In addressing whether a sentence has been lawfully imposed, the courts have considered matters surrounding the way sentence was imposed and whether

its length was arrived at in a lawful fashion. See e.g. Strickland v. State, 437 So.2d 150 (Fla. 1983)(explaining proper operation of enhancement statute); Eutsey v. State, 383 So.2d 219 (Fla. 1980)(specifying conditions for proper sentencing under Habitual Offender Act); Castle v. State, 305 So.2d 794 (Fla. 4th DCA 1974) aff'd 330 So.2d 10 (Fla. 1976)(specifying that punishment statute in effect at time offense committed, to be used in sentencing); Brumit v. Wainwright, 290 So.2d 39 (Fla. 1974)(addressing question related to credit for time served). While examples extend into other areas, the above cases illustrate the type of review Florida courts have engaged in the sentencing area.

With the advent of Sentencing Guidelines all this changed. For the first time the law provided for appeals of right from sentences outside of a specified range but otherwise within statutory limits. Fla. Stat. §921.001(5) (1985).

THE EFFECT OF SECTION ONE CHAPTER 86-273  
LAWS OF FLORIDA ON JUDICIAL REVIEW OF SENTENCING

In implementing review of sentencing decisions, this court has had occasion to rule that it was within the scope of the review authorized by the statute for reviewing courts to reach and rule on the extent of departure. Albritton v. State, 476 So.2d 158 (Fla. 1985). In the very next term following the decision, the legislature enacted Chapter 86-273. This had the effect of limiting the scope of review in departure

cases. In other words, the legislature limited its initial grant of jurisdiction or limited the scope of the remedy it had previously made available. The motion to dismiss and the memorandum of law contain respondent's principal arguments on this issue. In the interest of economy, they will not be repeated here at length as they have not been directly challenged in petitioner's supplemental brief.

As demonstrated in the memorandum portion of the motion to dismiss, appeals are remedies, and remedies are substantive. They fall exclusively within the province of the legislature to define. See State v. Creighton, 469 So.2d 735, 740 (Fla. 1985) (rejecting idea "that article, V, section 4 confers a right on any litigant to appeal any adverse final judgment or order.") It is the role of the legislature to make these policy judgments by duly enacted law. Cf. Argonaut Ins. Co. v. May Plumbing Co., 474 So.2d 212, 215 (Fla. 1985) (rate of interest on liquidated damages properly controlled by statute). Thus, it is clear that the legislature has effectively deprived appellate courts of the power to consider the extent of a departure unless the departure itself is invalid.

Petitioner's argument to the contrary is without merit. Article V of the Florida Constitution makes provision for appellate jurisdiction in various courts. It confers no power on the district courts to review final judgments of circuit courts. Creighton, 469 So.2d at 740. The grant of power is over appeals that may be heard of right. It is for the

legislature to specify when appeals may be heard of right. Accordingly, in Infante, the court was careful to point out that in the absence statutory authorization it lacked to power to review sentences within statutory limits. Brown did not even address the question. Rather, it held that the constitutional prohibition against cruel and unusual punishment applied only to statutory enactments and if the statute did not offend the provision then no sentence within its provisions would either. The case is not instructive on whether the reviewing courts of the state had the power to review sentences within statutory limits for abuse of discretion.

Petitioner's appeal to Benyard v. Wainwright, 322 So.2d 473 (Fla. 1975) is without merit. It does not shed any light on the jurisdictional question presented by the facts of this case. The case simply rules that the statute directing whether sentences were to be served concurrently or consecutively is a matter of substantive law and accordingly within the province of the legislature to control. It simply does not support the proposition that "inquiry into the proper exercise of a sentencing court's discretion is more accurately classified as procedural law." Brief of Petitioner at 7. Although included in the discussion of Benyard in the brief, Benyard is not cited as authority for the proposition. Indeed, petitioner's argument cites no authority for the assertion.

The appeal petitioner's argument makes to Section 9.040 (a) of the Florida Rules of Appellate Procedure is, likewise,

without merit. Reference to the committee note quoted in petitioner's argument shows as much. This section does not confer jurisdiction. In the words of the committee note, "the court may determine the entire case to the extent permitted by substantive law." (emphasis supplied).

Petitioner's separation of power argument is flawed because it fails to address and distinguish the case law, cited and argued to this court in the motion to dismiss and its memorandum, designating appellate jurisdiction as remedial and hence substantive for separation of powers purposes.

It is also flawed because it reasons from demonstrably false premises. Petitioner's argument seems to begin with the premise that appellate courts have always had the jurisdiction to review sentence length for abuse of discretion. The argument flatly states, "The pre Albriton refusal of the Florida appellate courts to review the propriety as distinguished from the legality of a sentence was not attributable to lack of judicial power to review abuse of trial court discretion." Brief of Petitioner at 6. This is, of course, directly contrary to Creighton. While not cited as direct authority for this proposition, the argument does cite to Brown v. State, 152 Fla. 853, 13 So.2d 458 (1943) and Infante v. State for the proposition that the appellate courts of this state have declined to review sentences because of the lack of express statutory authorization and the existence of alternative mechanisms for correcting sentences of excessive length. Respondent submits that petitioner's reading

of these cases is fatally flawed in light of the above discussion of the nature of appellate court's jurisdiction over sentencing decisions of trial courts and the discussion of the cases earlier in this brief.

Petitioner's brief's reference to cases involving statutes found to be in violation of the separation of powers has no bearing on the resolution of the question of jurisdiction presented in this case. None of the cited cases bear even the slightest analogy to the question presented here.

THE IMPLICATIONS OF SECTION ONE OF CHAPTER 86-723  
FOR THIS COURT'S REVIEW OF THE DISTRICT COURT DECISION AT ISSUE

This court's power to decide this case begins in Article V, Section 3(b)(4) of the Florida Constitution.<sup>1/</sup> But, as pointed out in the motion to dismiss and as illustrated by this court's decision in Griffin, appellate jurisdiction is derivative to the extent that it depends on the reviewing court's ability to issue a meaningful order. If this court can not give effect

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1/ Petitioner also contends that he has properly invoked this court's jurisdiction pursuant to Art. V. §3 (b)(3)(express and direct conflict). This court returned petitioner's brief on jurisdiction on this theory on March 7, 1986. Respondent has not, accordingly, had an opportunity to demonstrate why this is not an appropriate basis for this court's jurisdiction. Should the court wish to reconsider its jurisdiction on this basis, respondent would appreciate an opportunity to be heard. In light of the court's order directing these briefs, respondent does not feel free to respond to the arguments advanced to the effect that the court properly has jurisdiction over this case on any basis other than the certified question.

to an order directed to a district court because the district court has no power to carry out that order, this court loses jurisdiction. The only reason this court retained jurisdiction in Griffin was because it was within the court's power to give a meaningful answer to the question propounded by the district court, i.e. that yes, the district court had no jurisdiction over Griffin's case. But, here there is no meaningful answer that can be given to the certified question unless this court decides that the section is an unconstitutional invasion of the rule making power of this court.

Petitioner's argument's appeal to the authority of Sun Insurance Office, Limited v. Clay, 133 So.2d 735 (Fla. 1961) and In Re Alkire's Estate, 142 Fla. 802, 198 So. 475 (1940) in support of this court's jurisdiction is without merit. Neither the cases themselves nor the language quoted from them are apposite to the situation presented by the facts of this case. Of course, departments of government have the power to "accomplish all objects naturally within that department." But to say that does not address this case. As previously demonstrated, the power to establish appellate jurisdiction in this state falls exclusively to the legislature. What the legislature gives, it can take away in whole or in part. Thus, the language lifted from Sun Insurance has no application to the facts of this case. And, as the court was answering certified questions from a federal appellate court about the application of a statute of limitations and whether

it was applicable under the facts given and a question of insurance law, it has no application to the question of jurisdiction presented here.

Nor, do either the language quoted from or the decision in Alkire's Estate have any bearing on the resolution of this court's jurisdiction. That decision addressed, in material part, jurisdiction conferred by the then existing constitution. Reference to Creighton, shows that the jurisdiction at issue here arises out of statutes not the constitution itself. Finally, and perhaps of the most importance this is not a situation where there is a statute purporting to control the exercise of judicial power invested by the constitution. This court's jurisdiction to determine this case evaporated because the basis for it, the certified question, ceased to be meaningful.

PETITIONER'S SUGGESTION THAT THIS CASE CAN BE DETERMINED  
WITHOUT REFERENCE TO THE CONSTITUTIONAL QUESTION

Petitioner's argument suggests that this case can be determined without a resolution of whether Chapter 86-273, Laws of Florida is a constitutional exercise of legislative power over substantive law. The argument suggests that this could be done by answering the certified question and disapproving the result below. Respondent can not agree.

If the court answers the question, it has ruled on the merits of petitioner's constitutional claim. The power to answer the question evaporates if the district court has no

power to review the extent of a departure sentence once having determined a departure was appropriate. This court noted as much in its decision in Griffin v. Florida Parole and Probation Com'n, 485 So.2d 818, 820 (Fla. 1986) quoting Smallwood v. Gallardo, 275 So.2d 56, 62, 48 S.Ct. 23, 72 L.Ed. 152 (1927).

In terms of the analogy suggested by the language in this court's decision in Griffin, its jurisdiction over the case is like a branch dependent on the root of the district court's jurisdiction. If the legislative action seeking to prohibit appellate review of the extent of departure fails as petitioner's argument contends, then the root has not been cut and the branch, this court's jurisdiction, remains. On the other hand, if the legislature's act is a constitutional exercise of its power over substantive law, as respondent contends has been demonstrated, then the root is cut and this court's power withers with it leaving this court no alternative but to dismiss the case for want of jurisdiction. The court must, accordingly, reach petitioner's separation of powers claim.

CONCLUSION

WHEREFORE, Respondent respectfully ask to the court to make and enter an order dismissing the cause for want of jurisdiction on the basis of the above and foregoing reasons, arguments and authorities.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to Douglas S. Connor, Assistant Public Defender, 455 N. Broadway, P.O. Box 1640, Bartow, Florida on this 15<sup>th</sup> day of January, 1987.



OF COUNSEL FOR RESPONDENT