IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

vs.

COYE ELLIOTT BOYETT,

Respondent.

Case No. 65,754

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

BRIEF OF THE RESPONDENT ON THE MERITS

JERRY HILL
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

MICHAEL E. RAIDEN
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ATTORNEYS FOR RESPONDENT

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STATEMENT OF THE CASE AND FACTS

Respondent accepts Petitioner's statement of the case and facts.

ISSUE

IS A DEFENDANT WHO WAS PLACED ON PROBATION BEFORE OCTOBER 1, 1983, ENTITLED TO ELECT TO BE SENTENCED UNDER THE SENTENCING GUIDELINES AFTER OCTOBER 1, 1983, UPON REVOCATION OF HIS PROBATION?

Is probation a "sentence" for purposes of the guidelines? If so, argues Petitioner, then Respondent was "sentenced" in 1982 when he was placed on probation for a felony offense. His prison term, imposed in October, 1983, upon a violation of that probation, was the result of a "re-sentencing" and thus not within the parameters of the then-infant sentencing guidelines.

There is ample case law to the effect probation is not a "sentence" but a deferral of same. See e.g., Villery v. Florida Parole and Probation Commission, 396 So.2d 1107 (Fla.1981). As a result, appellate courts construing the sentencing guidelines have consistently held the guidelines apply to violations of probation sentenced after October 1, 1983. See e.g., Duggar v. State, 446 So.2d 222 (Fla.1st DCA 1983).

Respondent fails to see how the opinions rendered in the instant case, Duggar, et al., in any way limit the intent behind the sentencing guidelines, nor, as Petitioner suggests, do these decisions offer a trial judge "less discretion upon revocation of probation than he had when he placed the defendant on probation" (Brief of Petitioner 5). Presumably, probation would generally be imposed only when the defendant's point score placed him in the "non-state prison sanctions" cell. Such a sanction could involve probation or county time less than one year. Cf. Dade County v. Baker, 265 So.2d 700 (Fla.1972). Upon a violation of probation, assuming no new substantive violations would enhance the point score at resentencing, the defendant's score would remain the same,

leaving him in the same category as before. For this reason, Florida Rule of Criminal Procedure 3.701 has recently been amended to provide for enhancement to the next cell, or 12 or 30 months, in such situations. In the alternative, the appellate courts have held a violation of probation may be sufficient reason to sentence in excess of the guidelines. See e.g., Carter v. State, 452 So.2d 953 (Fla.5th DCA 1984). Either approach recognized the guidelines, as originally written, may have overlooked or otherwise failed to provide adequately for the situation faced in the case at bar. However, neither approach limits the discretion of the trial judge and neither suggests that the conclusion of law disputed by Petitioner herein is invalid.

There are also policy considerations supporting the holding of the court below. The guidelines were enacted, in part, to supplant the parole system. To exclude violations of pre-October, 1983, probations from the guidelines would be to create a class, however small a percentage of the total inmate population, of parole-eligible inmates requiring the continued maintenance of personnel, record-keeping, etc. Further, another of the goals behind the guidelines, increased unformity of sentences, would be defeated by leaving trial judges with unfettered discretion in cases such as this. Where one judge might have sentenced Appellant to 18 months for his violation, another might have imposed a 5-year sentence. The guidelines, especially as amended in 1984, deter such widely disparate dispositions.

CONCLUSION

For the reasons presented, Respondent asks this Honorable Court to answer the certified question in the affirmative.

Respectfully submitted,

JERRY HILL
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy has been furnished to the Office of the Attorney General, Park Trammell Building, Eighth Floor, 1313 Tampa Street, Tampa, FL 33602, by mail on this 18th day of September, 1984.

MICHAEL E. RAIDEN