IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

-v-

ALFRED FLOYD JACKSON,

Respondent.

Case No. 65,857

PETITIONER'S BRIEF ON THE MERITS

JIM SMITH
Attorney General

WALLACE E. ALLBRITTON
Assistant Attorney General

COUNSEL FOR PETITIONER

The Capitol
Tallahassee, FL 32301-8048
(904) 488-0290

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_____/

PETITIONER'S BRIEF ON THE MERITS

PRELIMINARY STATEMENT

References to the appendix submitted with this brief will be made by the symbol "A" followed by appropriate page number. References to the record proper filed in the lower court will be made by symbol "R" followed by appropriate page number. References to the sentencing transcript filed in the lower court will be made by the symbol "T" followed by appropriate page number.

STATEMENT OF THE CASE AND FACTS

Respondent was charged by information filed December 15, 1982, with two counts of welfare fraud (R 12). On April 4, 1983, after respondent had entered a plea of guilty to one count of welfare fraud, adjudication of guilt was withheld and he was placed on probation for three years (R 15, 16).

On October 12, 1983, an affidavit of violation of probation was filed alleging that respondent violated conditions 2, 4, and 9 of the order of probation (R 17). Respondent proceeded to a probation revocation hearing on November 22, 1983, before Circuit Judge Royce Agner (R 20). The court found that respondent had violated conditions 2, 4, and 9 of the order of probation and his probation was revoked (R 20, 26).

A sentencing hearing was held immediately following the revocation hearing (T-2). The court adjudicated respondent guilty of count 2 of welfare fraud and sentenced him to three years imprisonment (R 22-25; T-2).

Defense counsel orally moved the court to correct the sentence imposed on respondent (T-4). The ground for the motion was that the sentencing guidelines were effective for offenses committed after 12:01 a.m., October 1, 1983, and, if affirmatively elected by the defendant, to sentences imposed after that date for crimes occurring prior thereto (T-4, 5). Defense

counsel then requested that respondent be sentenced under the guidelines because, after respondent's probation was revoked, a new sentence was imposed (T-5, 6). The prosecution opposed respondent's request to be sentenced under the guidelines on the ground that "this is a continuing sentence, that they have already been told they're on probation, that was pre-guidelines and they are therefore not entitled to the guidelines today, they come in after that sentence." (T-8)

The trial court, expressing the view that respondent was not entitled to be sentenced in accordance with the sentencing guidelines, declined to sentence respondent pursuant thereto (T-10). The trial court further noted that even if respondent was sentenced according to the guidelines, it would "be of the mind to depart from the guidelines" and impose the identical sentence because respondent already had an opportunity to remain free under the conditions of probation which he did not comply with (T-10).

The Florida First District Court of Appeal reversed on the basis of Duggar v. State, 446 So.2d 222 (Fla.1st DCA 1984)(A-1, 2). Further, the lower court specifically held that: "The trial judge must make an initial determination of the recommended range for a defendant's crime, and only then may he make a determination that circumstances justify departure, giving his reasons in writing.[2]" In the footnote, the lower court certified

conflict with Harvey v. State, 450 So.2d 926 (Fla. 4th DCA 1984). This court has jurisdiction. Rule 9.030(2)(A)(VI), Florida Rules of Appellate Procedure.

ARGUMENT

ISSUE PRESENTED

WHETHER THE LOWER COURT ERRED IN RELYING ON Duggar v. State, 446 So.2d 222 (Fla.1st DCA 1984), AND REJECTING THE HOLDING IN Harvey v. State, 450 So.2d 926 (Fla.4th DCA 1984).

The lower court stated that the instant case is "factually indistinguishable" from Duggar. (A-2) It is submitted that the lower court overlooked the fact that the trial judge sub judice made alternative holdings or findings whereas this was not done by the trial judge in Duggar. In the instant case, the trial judge was obviously of the opinion that the guidelines were not applicable but noted that even if respondent was sentenced according to the guidelines, the trial judge would "be of the mind to depart from the guidelines" and impose the identical sentence (T-10). Petitioner says this is an alternative holding: the trial judge reasoned that the guidelines were not applicable to respondent but that even if they were, he would depart therefrom because respondent had demonstrated an inability to remain free under the conditions of probation which he did not comply with. Petitioner agrees that the trial judge erred in finding that the guidelines were not applicable in the instant case; however, the trial judge was correct in determining that even if

they were applicable, he would depart therefrom because of respondent's probation violation. It is no longer open to question but that a probation violation furnishes sufficient justification for a trial judge to depart from the presumptive sentence established in the guidelines. Consequently, petitioner urges that since the trial judge had sufficient reason to depart from the guidelines, his decision should not have been disturbed by the lower court. In the case of Savage v. State, 156 So.2d 566 (Fla.1st DCA 1963), the lower court stated the applicable rule:

> If a trial judge's order, judgment or decree is sustainable under any theory revealed by the record on appeal, notwithstanding that it may have been bottomed on an erroneous theory, an erroneous reason, or an erroneous ground, the order, judgment or decree will be affirmed.

Id. at 568.

Petitioner urges that the lower court erred in not following Harvey v. State, supra, dispensing with the requirements of a written statement providing the reasons for departure where the oral explanation in the record sufficiently provides the opportunity for meaningful review. See Judge Joanos' concurring opinion specifically dissenting from the majority's disagreement with Harvey (A-5). Petitioner also relies on Pimentel v. State, 442 So.2d 228 (Fla.3d DCA 1983), and cases cited therein. Suffice it to say that the record sub judice

containing the transcribed remarks of the trial judge was abundantly sufficient to furnish meaningful appellate review of his reasons for departing from the sentencing guidelines.

Notwithstanding the amendments to Rule 3.701(d)(14), Florida Rules of Criminal Procedure, the lower court held that respondent is entitled to be resentenced under the guidelines in effect at the time he was sentenced, citing Carter v. State, ___So.2d___(Fla.5th DCA 1984), 9 F.L.W. 1279. This is error. The Carter court's holding that the amended rules cannot be applied retroactively is predicated upon the rationale of Weaver v. Graham, 450 U.S. 24 (1981). Petitioner relies on the recent decision of Paschal v. Wainwright, ___F.2d___(11th Cir. 1984), Case No. 82-3088, opinion filed August 13, 1984* and Dobbert v. Florida, 432 U.S. 282 (1977), which hold that retroactive application of procedural rules are not violative of ex post facto prohibitions, if they are not more onerous than the law in existence at the time offense was committed.

In Paschal v. Wainwright, supra, the petitioner challenged the retroactive application of parole **guidelines** promulgated by Florida Parole & Probation Commission pursuant to F.S. 947.002,

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* A copy of the slip opinion has been attached as an appendix to this brief.

et seq., claiming an ex post facto violation. The court on the authority of Dobbert, supra, rejected his claim holding:

> Petitioner cites **Weaver v. Graham, supra,** as requiring us to find that the guidelines operated to his detriment in an ex post facto sense. We are not persuaded. In **Weaver,** the Florida legislature repealed a statute mandating nondiscretionary good conduct "gain time" for inmates and passed a law reducing the amount of gain time which prisoners could normally accrue. A prisoner whose offense and sentence occurred when the previous more liberal statute was in force claimed that the new law was void, as ex post facto, when applied to him. The United States Supreme Court agreed, stating that the law retroactively changed the legal consequences attached to the petitioner's crime; the Florida Legislature had increased the punishment that could be meted out for committing that crime by reducing inmates' ability to get gain time.
>
> **Petitioner's case is unlike Weaver in that petitioner challenges guidelines promulgated by a state agency to guide its discretion, not a mandatory statute adopted by the state legislature. The prisoner in Weaver had a mandatory statutory entitlement to receive a certain amount of automatically calculated good time credit. Since no discretion was involved in awarding that good time, the change in the formula by which it was calculated effectively lengthened the term of imprisonment for prisoners who obeyed the institutional rules.** 450 U.S. at 34-36, 101 S.Ct. at 967, 968. **In contrast, the Commission's parole decision, both under the parole system at the time of petitioner's conviction and under the guidelines, involved the use of discretion and judgment.** See Fla.Stat. Ann. §947.172(3) & (3) (1983)

> Supp.); **Overfield v. Florida Parole Commission,** 418 So.2d 321 (Fla.App.1982). The promulgation of guidelines under the Act did not alter the consequences that flowed from petitoner's crime: both in 1968 when he committed that crime, and in 1979, when the Commission set his presumptive parole date, the Commission had complete discretion over the parole decision. Only the form by which the Commission exercised that discretion changed. (Emphasis added)(Footnote omitted).

Id. at 4736, 4737, slip opinion. See also May v. Florida Parole and Probation Commission, 435 So.2d 834 (Fla. 1983), Lopez v. Florida Parole and Probation Commission, 410 So.2d 1354 (Fla. 1st DCA 1982), cited with approval in Paschal v. Wainwright, supra.

In view of the foregoing, Petitioner contends that the rationale of Weaver v. Graham, supra, is similarly inapposite to Carter v. State, supra, as well as the instant case since this Court has recognized that the trial judges (like the Parole Commission) continue to have the same broad sentencing discretion conferred upon them under the general law, subject only to certain limitations or conditions imposed by the guidelines, which are to be narrowly construed so as to encroach as little as possible on the sentencing judge's discretion. Garcia v. State, ___So.2d___(Fla. 1st DCA 1984), Case Nos. AW-135, AW-313, opinion filed August 14, 1984. See also Addison v. State, ___So.2d___(Fla. 2d DCA 1984), 9 F.L.W. 1474; Fla.R.Crim.P. 3.701(b)(6). In short, the amended as well as the original rules

changed only the procedural form in which the trial court's inherent sentencing discretion is to be exercised.

In Dobbert v. Florida, supra, where the Court rejected Dobbert's claim that the application of new capital **sentencing procedure** (Florida Statutes §921.141) enacted subsequent to the commission of his crime but prior to his trial constituted an ex post facto violation. The Dobbert Court held:

> Even though it may work to the disadvantage of a defendant, a procedural change is not ex post facto.

Id. at 293. Petitioner urges that if retroactive application of capital sentencing procedures does not constitute an ex post facto violation, how can it then be said that retroactive application of sentencing procedures in non-capital cases would?

It may be urged that the determination of whether an ex post facto violation would occur if the amended rules were applied retroactively depends upon an analysis of the operation of the rules at the time Respondent was sentenced vis-a-vis the operation of the amended rules. Such an analysis for ex post facto purposes is incorrect. The proper inquiry goes to the operation of the rules, if any, governing the exercise of sentencing discretion at the time the offense was committed vis-a-vis the operation of the amended rules. Dobbert v. Florida, supra.

When analyzed in this perspective, there is no question that the amended rules, being procedural in nature, do not place a more onerous burden on Respondent than the law in effect when he committed the offense on April - September, 1981 (R-13), since at that time the guidelines were not in effect and the trial court's sentencing discretion was wholly unbridled and unreviewable so long as the sentence imposed was within statutory parameters. See Brown v. State, 13 So.2d 458 (Fla. 1943); Weathington v. State, 262 So.2d 724 (Fla. 3d DCA 1972), cert. denied, 256 So.2d 330 (Fla. 1972), cert. denied, 411 U.S. 968 (1973); Banks v. State, 342 So.2d 469 (Fla. 1976). Thus, the retroactive application of the amended rules does not contravene ex post facto prohibitions.

Consequently, there being no question that the amended rules should apply to any resentencing of Respondent, the disposition of this cause is controlled by Burney v. State, 402 So.2d 38 (Fla. 2d DCA 1982); Boston v. State, 411 So.2d 1345 (Fla. 1st DCA 1982); and State v. Strasser, 445 So.2d 322 (Fla. 1983).

CONCLUSION

This court should quash the decision of the lower court vacating the sentence and remanding for resentencing, approve the decision of the Fourth District in Harvey v. State, supra, and specifically reject the holding of the lower court that the amended rule cannot be applied retroactively.

Respectfully submitted,

JIM SMITH
Attorney General

By: Wallace E. Allbritton
WALLACE E. ALLBRITTON
Assistant Attorney General

COUNSEL FOR PETITIONER

The Capitol
Tallahassee, FL 32301-8048

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have furnished a copy of the foregoing Petitioner's Brief on the Merits to Ms. Charlen V. Edwards, Assistant Public Defender, Post Office Box 671, Tallahassee, Florida 32302, by hand-delivery, this 1st day of ~~September~~ October, 1984.

Wallace E. Allbritton
WALLACE E. ALLBRITTON
Assistant Attorney General

of Counsel