IN THE SUPREME COURT OF FLORIDA

JEFFREY SCOTT GAGE,

Petitioner,

vs. CASE NO. 66,389

STATE OF FLORIDA,

Respondent.
_____/

RESPONDENT'S BRIEF ON THE MERITS

ON DISCRETIONARY REVIEW FROM
THE FIRST DISTRICT COURT OF APPEAL

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STATEMENT OF THE CASE AND FACTS

The State accepts the Petitioner's statement, noting especially that this case has been reversed and remanded for resentencing on other, independent, grounds. That order has not been challenged and thus the Petitioner is, for all intents and purposes, unsentenced at this time.

SUMMARY OF ARGUMENT

The election of guidelines sentencing is a strategic decision which does not affect a recognized right (since there is no right to parole). As a strategic decision, it is not subject to inquiry into whether it was "knowingly and intelligently" entered. Furthermore, this decision can be announced by counsel and is binding upon the accused.

Therefore, the Petitioner is not entitled to relief.

ARGUMENT

DEFENDANTS WHO COMMITED CRIMES PRIOR TO OCTOBER 1, 1983, AND WHO AFFIRMATIVELY ELECT GUIDELINES SENTENCING, NEED NOT BE SHOWN TO HAVE KNOWINGLY AND INTELLIGENTLY WAIVED PAROLE SINCE THERE IS NO CONSTITUTIONAL RIGHT TO PAROLE.

The First District has correctly held that the "affirmative election" provided under the sentencing guidelines is qualitatively different from the "knowing and intelligent waiver" involved in cases where constitutional rights are at stake. Williams v. State, 454 So.2d 751 (Fla. 1st DCA 1984); Jones v. State, ___ So.2d ___ (Fla. 1st DCA 1984), 9 FLW 2478; Coates v. State, ___ So.2d ___ (Fla. 1st DCA 1984), 9 FLW 2421.

The Petitioner, however, contends that:

(1) A "right" (to parole) is at stake which must be knowingly and intelligently waived as a precondition for a valid election, and

(2) The knowing and intelligent waiver must appear on the record.

The Petitioner asserts that the First District's decisions are "simplistic" because they ignore "the fact that any defendant who elects the guidelines is necessarily giving up a valuable right - the right to parole." (brief, p. 8).

Of course, there is nothing simplistic in the First District's opinions. What is simplistic, however, is the assumption that defendants have a "right" to parole. This is clearly incorrect.

In Greenholtz v. Inmates at the Nebraska Penal and Correctional Complex, 442 U.S. 1, 60 L.Ed.2d 668 (1979) the Court recognized once again that there is no constitutional right to parole, and that the question of whether a state statute provides a protectible entitlement was one to be resolved in a case by case basis. Florida inmates, while entitled to procedural computation of non-binding "presumptive parole release dates," have no right to release on parole. Daniels v. Florida Parole and Probation Commission, 401 So.2d 1351 (Fla. 1st DCA 1981); Staton v. Wainwright, 665 F.2d 686 (5th Cir. 1982)[1], cert. den. 72 L.Ed.2d 166. It must also be remembered that "parole" is not tantamount to a termination of sentence or completion of sentence but, rather, is merely a means for serving out the "balance" of a sentence outside the prison walls. Marsh v. Garwood, 65 So.2d 15 (Fla. 1953). Thus, parolees can file habeas corpus petitions because they are in custody and not at liberty.

It is this simple fact that distinguishes a waiver of parole from a waiver of a constitutional right, as in Boykin v. Alabama, 395 U.S. 238, 23 L.Ed.2d 274 (1969).

That is why no "due process" (U.S.C.A. Const. Amends. 5,14) violations have been found in cases where timely initial parole interviews have not been held, see Staton v. Wainwright, supra;

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1 see Moore v. Florida Parole and Parobation Commission, 289 So. 2d 719 (Fla. 1974), cert. den. 41 L.Ed.2d 239.

or where prisoners have not been given notice of rule changes affecting PPRD's, see Woulard v. Florida Parole and Probation Commission, 426 So.2d 66 (Fla. 1st DCA 1983); Hunter v. Florida Parole and Probation Commission, 674 F.2d 847 (11th Cir. 1982).

If Mr. Gage had been sentenced in a manner which would entitle him to parole consideration, his only "right" would be a right to consideration itself, not parole. Moore v. Florida Parole and Probation Commission, supra. The actual granting of parole would be purely discretionary, Gaines v. Florida Parole and Probation Commission, ___ So.2d ___ (Fla. 4th DCA 1983), 10 FLW 153, depending upon Gage's conduct or the receipt of critical new information.

This brings us to the question of waiver. It is, of course, undisputed that defendants may waive even constitutional rights. There is a difference, however, between waiver of a constitutional right and waiver of a lesser right or privilege.

92 C.J.S., "waiver" at pages 1041-1049, 1053-1055 and 1061-1062 discusses "waiver", characterizing it as a voluntary or intentional relinquishment of a known right, an essentially unilateral act, see Gilman v. Butzloff, 22 So.2d 263 (Fla. 1945).

Prisoners have a statutory right to be periodically interviewed and evaluated for parole. This right, however, may be waived either expressly or impliedly, by conduct or acquiesceance. see OP. ATTY. GEN. 78-29.

Assuming arguendo[2] the ability of a defendant to waive a right even of constitutional magnitude, the question arises as to whether this "waiver" is sufficiently evidenced by an affirmative election, announced by counsel, or whether further inquiry is required.

Recently, in Johnson v. Wainwright, case no. 66,445 (Jan. 28, 1985), this Court discussed, in dicta, whether a defendant could waive a Sixth Amendment Right vicariously by announcement of counsel (in the context of whether appellate counsel was ineffective for not appealing Johnson's "absence" at a critical stage of his trial despite the announcement since "only" Johnson could waive his right). (This Court held that counsel was not ineffective).

The cases relied upon in Johnson are of assistance here.

In Wainwright v. Sykes, 433 U.S. 72 (1972) the ability of trial counsel to make and announce strategic decisions of, by and for his client was recognized. Similarly, in Castor v. State, 365 So.2d 701 (Fla. 1978); McPhee v. State, 254 So.2d 406 (Fla. 1st DCA 1971) and Ray v. State, 403 So.2d 956 (Fla. 1981) it was held that defendants are bound by the acts of counsel and cannot challenge judicial acts done at counsel's request. The rationale being, as noted in Curry v. Wilson, 405 F.2d 110 (9th Cir. 1968), that defendants should not be free to

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2 For the purpose of this argument an affirmative election is compared to a "knowing waiver," although the State agrees with with District Court that the terms are not synonymous.

exercise one strategic move at trial and then, if dissatisfied with the result, challenge it on appeal. see also Estelle v. Williams, 425 U.S. 501 (1976).

Relating this to our case, we find, on the record, the fact that:

(1) Defense counsel announced that Gage had affirmatively elected guidelines sentencing.

(2) Defense counsel and the trial judge noted on the record their disagreement over the availability of parole.

If we assume arguendo, and we must, that defense counsel was competent, then we must assume that Gage was told that there was no possibility of parole if a non-guidelines sentence was imposed absent some shift in the court's known opinion (R 68-70) on the subject. Counsel presumably told Gage that there was no legal precedent for this proposition as well.

Therefore, Gage elected guidelines sentencing with a complete understanding that he was sacrificing any statutory right to parole. His lawyer announced this affirmative election on the record, and the court had an absolute right to act on the representation (unobjected to, we might add) of counsel in the defendant's presence.

Thus, we can see that the certified question must be answered in a manner consistent with the declaration of the First District, to wit:

(1) An election to accept guidelines sentencing is qualitatively different from a knowing and intelligent "waiver" of a "right" since no "right" is being "waived" as a result of the election.

(2) Since this is not a "waiver" per se, but rather a strategic decision, counsel's announcement of this strategic choice is:

(a) presumptively the result of competent advice to the client, and

(b) binding upon the client.

(3) There is no requirement that the court look behind the pronouncement of counsel and inquire of the defendant the "knowing" and "intelligent" nature of his strategic decision.

Finally, it should be noted that while one who is sentenced under the guidelines suffers the burden of loss of parole eligibility, he picks up the benefit of something which was previously not subject to appellate review, i.e., review of his sentence if he receives a statutory sentence as opposed to a "guidelines" sentence.

CONCLUSION

The certified question should be answered in the negative, as decided by the First District.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Respondent's Brief on the Merits has been forwarded by hand delivery to Counsel for Petitioner, P. Douglas Brinkmeyer, Assistant Public Defender, Post Office Box 671, Tallahassee, Florida 32302, this 18th day of February, 1985.

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