IN THE FLORIDA SUPREME COURT

66,389

JEFFREY SCOTT GAGE,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

CASE NO. ~~66,388~~

ON DISCRETIONARY REVIEW FROM
THE FIRST DISTRICT COURT OF APPEAL

BRIEF OF PETITIONER ON THE MERITS

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BRIEF OF PETITIONER ON THE MERITS

I PRELIMINARY STATEMENT

Petitioner was the defendant in the trial court, and appellant in the lower tribunal. He will be referred to as petitioner in this brief. A one volume record on appeal, and two volume transcript, are sequentially numbered at the bottom of each page, and will be referred to as "R" followed by the appropriate page number in parentheses. Attached hereto as an appendix is the opinion, Gage v. State, No. AY-50 (Fla. 1st DCA December 14, 1984).

II STATEMENT OF THE CASE AND FACTS

By information filed January 19, 1982, petitioner was charged with grand theft and resisting an officer with violence (R 1). On April 26, 1982, petitioner entered a plea of guilty to grand theft and to resisting an officer without violence (R 23-25). On June 25, 1982, adjudication of guilt was withheld, and petitioner was placed on probation for five years for the grand theft (R 26-27).

On May 17, 1983, an affidavit of violation of probation was filed (R 28-29). On November 10, 1983, petitioner appeared with counsel before Circuit Judge N. Russell Bower for a hearing; petitioner admitted the probation violation; petitioner's probation was revoked (R 32;61-64).

At sentencing on February 7, 1984, petitioner's counsel entered a "conditional" election for him to be sentenced under the sentencing guidelines:

> MS. SUTTON: Judge, I am not sure if we announced an election of the guidelines at the VOP hearing. I would like to now, if we haven't already, announce Mr. Gage's intention of electing to be sentenced under the guidelines with the understanding that Mr. Gage understands that if he is sentenced within the range provided by the guidelines that the parole would be unavailable to him but I believe, correct me if I'm wrong, it is also my understanding if the court elects to go outside the guidelines he is not necessarily waived his right to parole. Is that not correct? [Emphasis added].
>
> THE COURT: I don't know about that, is something you have to take up the the Parole Commission.
>
> MS. SUTTON: I would like to announce for the record that the election to be sentenced under the guidelines is predicated on the assumption that the court

would follow the guidelines. I understand, Judge, your reasoning in this case. You've discussed it with me I believe off the record but I just wanted to state that for the record that that is what his election is based on that assumption.

What I'm trying to do, I know you and I have a disagreement about these guidelines cases, assuming that you are sustained, I would like to preserve the issue of his . . . This is an unusual set of facts insofar as there are few people falling into the category of having the option to be sentenced under the guidelines because the offenses are committed before and the sentencing occurs after and for those people are they are giving up affirmative right by electing to be sentenced under guidelines and our position is that they shouldn't be penalized if the court does not sentence them within the guidelines. It shouldn't have to be a gamble, in other words, and that is all I'm trying to preserve by stating this on the record.

THE COURT: I understand what you are saying. You want your cake and eat it too. And I don't know whether they will allow you to do that.

I have no objection for the protection of the record as you have tried to do and, but I don't think it is my perrogative to decide.

MS. SUTTON: I understand that, Judge.

THE COURT: You say you assume I'm not going to follow the guidelines, I'm going outside the guidelines? Or rather you say you assume I'm not going outside the guidelines?

MS. SUTTON: The election is predicated on the assumption that he will be sentenced within the range provided by the guidelines.

THE COURT: I will announce to you that that is erroneous.

(R 68-70; emphasis added). The opinion of the First District

accurately reflects what happened next:

> The record of the sentencing hearing shows that the trial court did not have a scoresheet before it when it imposed the sentences challenged by this appeal. Gage's counsel informed the court that she had prepared one but felt it was incorrect. The court then gave leave to file a correct one within five days of the hearing. There is no indication that the allegedly incorrect scoresheet was seen by the court. It does not refer to it nor does it appear in the record. Nor could it have had before it the scoresheet that does appear in the record, indicating a score of 14 points. Not only is there no date on this scoresheet to indicate when it was filed, but the court had just given Gage's counsel five days past the hearing to file it. It therefore appears that there was no scoresheet before the court when it imposed the sentences, despite the admonition of Rule 3.701(d)(1), Florida Rules of Criminal Procedure, that "[t]he sentencing judge shall approve all scoresheets" and of the note to the rule: "Ultimate responsibility for assuring that scoresheets are accurately prepared rests with the sentencing court." (App. at 2).

Petitioner was adjudicated guilty of grand theft and sentenced to five years in state prison for that crime (R 34-41;72-75).

On appeal to the First District, petitioner argued that his election was not knowingly and voluntarily made, and that the court erred in sentencing him without an accurate scoresheet. The First District agreed with the latter argument and remanded for resentencing. The First District disagreed with the election argument, citing its prior decision in Moore v. State, 455 So.2d 535 (Fla. 1st DCA 1984), but certified the following question:

> When a defendant who committed a crime before 1 October 1983 affirmatively selects sentencing pursuant to the sen-

> tencing guidelines, must the record show the defendant knowingly and intelligently waived the right to parole eligibility? (App. at 2).

On January 11, 1985, a timely notice of discretionary review was filed.

III SUMMARY OF ARGUMENT

Petitioner will argue in this brief that an election to be sentenced under the sentencing guidelines must be knowingly and voluntarily made, as opposed to affirmative, since his election necessarily waives his right to parole eligibility on any portion of his five year sentence.

IV ARGUMENT

ISSUE PRESENTED

WHEN A DEFENDANT WHO COMMITTED A CRIME BEFORE 1 OCTOBER 1983 AFFIRMATIVELY SELECTS SENTENCING PURSUANT TO THE SENTENCING GUIDELINES, THE RECORD MUST SHOW THE DEFENDANT KNOWINGLY AND INTELLIGENTLY WAIVED THE RIGHT TO PAROLE ELIGIBILITY.

The First District has in a number of cases, in addition to the instant one, held that an election to be sentenced under the sentencing guidelines need only be "affirmative" as opposed to the more strict "knowing and voluntary" standard. Williams v. State, 454 So.2d 751 (Fla. 1st DCA 1984); Kiser v. State, 455 So.2d 1071 (Fla. 1st DCA 1984); Coates v. State, No. AX-317 (Fla. 1st DCA November 16, 1984); Jones v. State, No. AW-148 (Fla. 1st DCA November 28, 1984); Millett v. State, No. AX-377 (Fla. 1st DCA December 10, 1984); and Cochran v. State, No. AY-49 (Fla. 1st DCA December 13, 1984), discretionary review pending, Case No. 66,388. In all of these cases, the First District has cited Moore, its initial decision on this question, as authority for the proposition that an election need only be affirmative.

In Moore, the court found that neither this Court nor the Legislature had intended that an election be anything more than "affirmative", since that term is used both in Section 921.001(4)(a), Florida Statutes, and in this Court's opinion promulgated the original guidelines in 1983, In re Rules of Criminal Procedure (Sentencing Guidelines), 439 So.2d 848 (Fla. 1983). The court apparently believed that because the words "knowing and voluntary" do not appear in

either source, and the term "affirmative" does, then a waiver need not be knowing and voluntary. The problem with the First District's simplistic view of the statute and rule is that it ignores the fact that any defendant who elects the guidelines is necessarily giving up a valuable right - - the right to parole.

Without question, if a defendant elects to be sentenced under the guidelines, he is not eligible for parole on any part of his sentence, and he can only be released from prison through one of three other specified methods:

> A person convicted of crimes committed on or after October 1, 1983, or any other person sentenced pursuant to sentencing guidelines adopted under this section shall be released from incarceration only:
> (a) Upon expiration of his sentence;
> (b) Upon expiration of his sentence as reduced by accumulated gain-time; or
> (c) As directed by an executive order granting clemancy.
>
> The provisions of chapter 947 shall not be applied to such person.

Section 921.001(8), Florida Statutes.

The First District's simplistic view also ignores the rule of law that when parole is denied to someone who is otherwise eligible for it, an ex post facto violation occurs.

Legislative restriction of the statutory right to be considered for parole violates the ex post facto clauses of both the state and federal constitutions, Art. I §9,10 United States Constitution and Art. I, §10 Florida Constitution, if applied to persons whose offenses occurred prior to the effective date of the act imposing the restrictions.

For example, in State v. Williams, 397 So.2d 663 (Fla. 1981) this Court held that Section 947.16(3), Florida Statutes, authorizing retention of jurisdiction by the trial judge to vacate a parole order, had disadvantageous consequences and therefore when applied to persons whose crimes occurred before the act became effective was a prohibited ex post facto law.

In Weaver v. Graham, 450 U.S 24 (1981) the Court held that a statute decreasing gain time credits was retroactive in application and therefore violated the ex post facto clause of the constitution, saying:

> We need not determine whether the prospect of the gain time was in some tactical sense part of the sentence to conclude that it in fact is one determinant of petitioner's prison term - and that his effective sentence is altered once this determinant is changed. [Citations omitted]. See also Rodriquez v. United States Parole Commission, 594 F.2d 170 (Ca. 7 1979)(elimination of parole eligibility held an ex post facto violation). We have previously recognized a prisoner's eligibility for reduced imprisonment is a significant factor entering into both the defendant's decision to plea bargain and the judge's calculation of the sentence to be imposed.

450 U.S. at 31-32.

A fundamental principle of law is that a waiver of constitutional rights cannot be presumed from a silent record. Carnley v. Cochran, 369 U.S. 508 (1962); Boykin v. Alabama, 395 U.S. 238 (1969). The record fails to show that petitioner knew or understood that in exchange for selecting guidelines sentencing he was giving up the right to parole consideration at any time during the sentencing hearing.

The Legislature and this Court have both stated that a defendant could elect sentencing under the guidelines. No procedure, however, was suggested or adopted for making that election as a matter of record. Because the election inherently involves waiver of a constitutional right, the record of that election must show a knowing and voluntary and intelligent waiver, in the same manner as the record of a guilty plea must show the waiver of certain constitutional rights given at that time. Florida Rule of Criminal Procedure 3.712(c)(iii). Moreover, the court is required by that rule to inform the defendant of any minimum sentences or portions of sentences during which there is no parole eligibility. Florida Rule of Criminal Procedure 3.172(c)(i); Peak v. State, 399 So.2d 1043 (Fla. 5th DCA 1981). A plea which is defective is non-compliance with this rule vulnerable to attack. Williams v. State, 316 So.2d 267 (Fla. 1975).

In State v. Green, 421 So.2d 508 (Fla. 1982), the issue was whether it was error to deny a motion to vacate a sentence after a guilty plea in which the trial judge had failed to inform the defendant of the possibility of retaining jurisdiction to vacate parole during one-third of his sentence. This Court held that the lack of a proper advisement of the consequences of the plea was reversible error.

The issue here is similar but not the same as that in Green. Petitioner is asking to have the opportunity to withdraw his sentencing election. The error was in not

stating the consequences of electing to be sentenced under the guidelines. The record should have shown that petitioner knew that a sentence within the guidelines deprived him of parole; that for the graver possibility of an aggravated sentence beyond the guidelines range, there was no parole even for that portion which deviated from the presumptive sentence; and that by choosing the guidelines the protection against ex post facto laws was being relinquished.

The Sentencing Guidelines Commission apparently anticipated that some waiver would be placed upon the record. The former Executive Director of the Commission, Robert Wesley, wrote the following:

> The record should reflect that the defendant understands the impact of the selection, with emphasis on the fact that s/he will be ineligible for parole release.

The Florida Bar, Sentencing Guidelines and Sentencing Advocacy Seminar at 1.6.

Moore is not controlling here because the point is not whether a particular word was used in a rule of procedure or in a statute in determining whether a trial judge can ascertain if a defendant understands he is waiving the right to parole; the issue here is whether the constitutional right against ex post facto laws was waived. Since the waiver of federal constitutional rights is governed by federal standards the absence of particular words in a rule of procedure or statute is immaterial. Even without a procedural rule enacted by this Court, federal waiver standards would control. Moore's simplistic view does not address the

serious waiver of the constitutional right and therefore should not control this issue.

Particularly compelling is the total silence of the record as to petitioner's knowledge of the ex post facto rights or his ability to understand the selection made by counsel who was confused during the sentencing proceedings.

The constitutional right against ex post facto application of the law is personal to the defendant and therefore must be exercised personally by the defendant. Brookhart v. Janis, 384 U.S. 1 (1966)(counsel cannot waive his client's right not to plead guilty and to have a trial; defendant neither personally waived his rights nor acquiesced in his lawyer's attempted waiver). Again, the record here is totally silent on petitioner's personal waiver of his federal constitutional right. Again, presumed waiver from a silent record is impossible. Carnley v. Cochran, supra; Boykin v. Alabama, supra.

This Court, moreover, in Harris v. State, 438 So.2d 787 (Fla. 1983) held that the waiver of the defendant's procedural right to have the jury instructed on lesser offenses must be made personally and not just by counsel. The record is required to show that the waiver was knowingly and intelligently made. There is no such rule of procedure currently in effect. More importantly, in Tucker v. State, 459 So.2d 306 (Fla. 1984), this Court held that a defendant must personally waive the protection of the statute of limitations when he seeks to have the jury instructed on lesser offenses which otherwise would be barred by the statute of

limitations:

> The statute of limitations defense is an absolute protection against prosecution or conviction. Before allowing a defendant to divest himself of this protection, the court must be satisfied that the defendant himself, personally and not merely through his attorney appreciates the nature of the right he is renouncing and is aware of the potential consequences of his decision. We agree with the state's position that an effective waiver may only be made after a determination on the record that the waiver was knowingly, intelligently and voluntarily made; the waiver was made for the defendant's benefit and after consultation with counsel; and the waiver does not handicap the defense or contravene any of the public policy reasons motivating the enactment of the statute.

Tucker v. State, at 309; emphasis added.

In the same way as Tucker held that the request for instructions on lesser offenses was not equivalent to an expressed waiver of the statute of limitations, the request for guidelines sentencing was not equivalent to a waiver of the constitutional protection against ex post facto laws. Nor did the selection announced by petitioner's confused counsel tend to amount to knowing and voluntary waiver on the part of petitioner, personally, as required by Harris and Tucker. It is important to note that there is no rule of procedure governing waiver of the statute of limitations.

Petitioner's valuable constitutional right against an ex post facto application of the law was not clearly waived. Not even a reasonable implication of a waiver can arise from this record where it is not even clear that the judge understood what petitioner's counsel said in court. A waiver of

constitutional rights cannot be presumed or upheld on a record like this.

The First District and Second District have correctly held that an election cannot be inferred from a totally silent record, where nothing is said by a defendant or his lawyer regarding the guidelines' applicability to a pre-October 1, 1983, crime, and where a guidelines sentence is imposed Randolph v. State, 458 So.2d 64 (Fla. 1st DCA 1984); Rodriquez v. State, 458 So.2d 899 (Fla. 2d DCA 1984); and Patterson v. State, No. AV-289 (Fla. 1st DCA December 18, 1984). It is contradictory that the courts would require something regarding an affirmative election to appear on the record, but would not require anything regarding the waiver of parole eligibility to appear on the record.

One judge of the First District has agreed with petitioner's position that a knowing and voluntary waiver of parole eligibility is required where a defendant, at least during a plea colloquy, elects to be sentenced under the guidelines for a pre-October 1, 1983, crime. In Jones v. State, supra, Chief Judge Ervin, dissenting, stated:

> In my judgment, because the record fails to reveal the existence of an express waiver of the defendant's right[1] to a proper consideration of parole, the statute and the rule, in their application, not facially, must be said to violate constitutional prohibitions against ex post facto law. A violation of the ex post facto constitutional provision occurs when a law has retrospective effect, i.e., it applies to events occurring before its enactment, and it disadvantages to the offender affected by it. Weaver v. Graham, 450 U.S. 24, 29, 101 S.Ct. 960, 67 L.Ed.2d 17, 23 (1981). Weaver indicates that if a defendant

is deprived of the right to qualify for parole, the deprivation may amount to an ex post facto violation, if applied retroactively. 450 U.S. at 34. In the case on review, appellant, by selecting guideline sentencing, unknowingly waived a valuable right: the right to be sentenced under the law existing at the time the offense was committed.[2]

Thus there should be no question that retroactive application of Section 921.001, Florida Statutes, or of Florida Rule of Criminal Procedure 3.701, could amount to an ex post facto violation if a defendant does not knowingly and intelligently waive his or her right to a proper consideration of parole.

A situation similar to that before us occurs when, as part of a plea bargain, the defendant is not informed by the court that it may retain jurisdiction over a portion of his sentence. See State v. Green, 421 So.2d 508, 509 (Fla. 1982), holding that the imposition of retention is a significant consideration in the plea bargain arrangement which should be fully explained to a defendant before his plea is accepted, otherwise he would not be completely informed of the consequences of his plea. See also Shofner v. State, 433 So.2d 657 (Fla. 1st DCA 1983); Ward v. State, 433 So. 1221 (Fla. 3d DCA 1983); Brown v. State, 434 So.2d 21 (Fla. 2d DCA 1983).

Nor should there be any question that the defendant was disadvantaged by the sentence imposed. Admittedly the trial judge could have sentenced appellant outside the guidelines to a five-year term of imprisonment. See Sections 812.014(2)(c); 775.082(3)(d), Florida Statutes. Nevertheless, pursuant to the Objective Parole Guidelines Act, appellant would have been eligible for a parole interview within eight months of her sentence, to have a presumptive parole release date set within 90 days of that interview, and to have the release date reconsidered periodically. See Sections 947.16(1)(a), 947.172(2), and 947.174, Florida Statutes.

Jones v. State, supra, slip opinion at 5-6; footnotes omitted.

Petitioner therefore urges this Court to adopt Chief Judge Ervin's dissenting opinion in Jones as the law of Florida, i.e., that an election of the sentencing guidelines must be knowingly and voluntarily made, and that the defendant must expressly waive his right to parole in making his election.

Even if this Court declines to adopt a per se rule, it should find the "conditional" election in the instant case to be invalid, due to the obvious confusion of petitioner's trial counsel regarding his parole eligibility. As the colloquy quoted above shows, petitioner's counsel attempted elect guidelines sentencing if the court decided to remain within the guidelines range, whatever that range would be. Petitioner's counsel also believed that petitioner would be eligible for parole on the portion of his sentence which exceeded the guidelines range.

Compare this colloquy with that which occurred in Moore:

> The record indicates the following exchange took place between the trial court and defense counsel:
>
> MR. GREEN: For the record, Your Honor, I have discussed this with my client. The Court was kind enough to give us an option. I think even under the law we're entitled to an option for us to determine whether or not we would elect to be sentenced under the guidelines. I have discussed this with my client. We have chosen to be sentenced under the guidelines, even though the crime was committed before October 1.
>
> THE COURT: All right. He elects to be sentenced under guidelines?
>
> MR. GREEN: That's correct.

> THE COURT: I want the court file to clearly show that. (T. 588) (emphasis added)
>
> We hold the above colloquy to be clear evidence of Moore's affirmative selection to be sentenced under the guidelines.

455 So.2d at 536.

The court in Moore found this type of election to meet the less restricted "affirmative" standard. On the other hand, petitioner submits that his counsel's statement shows that his election does not meet the "affirmative" standard since his counsel was confused on two vital points. Petitioner's election certainly does not meet the heavier "knowing and voluntary" constitutional standard, since he was never told he would be giving up his right to parole on any portion of his sentence, and since the record contains nothing from petitioner's mouth on this subject. Even if this Court rejects the "knowing and voluntary" standard, petitioner's election clearly fails even the Moore "affirmative" test, and so petitioner's sentence should be vacated to allow him to make an intelligent election.

V CONCLUSION

Based upon the foregoing argument, reasoning, and citation of authority, petitioner urges that this Court disapprove the "affirmative" standard, and adopt the "knowing and voluntary" standard. In the alternative, under either standard, petitioner submits that his election was not proper, and requests that this Court vacate the sentence and remand for resentencing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above Brief of Petitioner on the Merits has been furnished by hand delivery to Assistant Attorney General Mark Menser, The Capitol, Tallahassee, Florida 32301; and by U.S. Mail to petitioner Jeffrey Scott Gage, #325800, Apalachee Correctional Institution, East Unit, Post Office Box 699, Sneads, Florida 32460 on this 29 day of January, 1985.

P. Douglas Brinkmeyer

P. DOUGLAS BRINKMEYER