IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

vs.

JEFFREY JEROME MILTON,

Respondent.

CASE NO. 66,393

PETITIONER'S REPLY BRIEF ON THE MERITS

ATTORNEY GENERAL
JIM SMITH

W. BRIAN BAYLY
ASSISTANT ATTORNEY GENERAL
125 N. Ridgewood Avenue
Fourth Floor
Daytona Beach, Florida 32014
(904) 252-2005

COUNSEL FOR PETITIONER

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AUTHORITIES CITED

OTHER AUTHORITIES

POINT

CONSTRUING SECTION 921.001, FLORIDA STATUTES (1983), WITH SECTION 948.06(1), FLORIDA STATUTES (1983) AND ARTICLE X, SECTION 9, OF THE FLORIDA CONSTITUTION, THE TRIAL COURT WAS CORRECT IN NOT UTILIZING THE SENTENCING GUIDELINES FOR PURPOSES OF SENTENCING APPELLANT AS A PROBATION VIOLATOR.

ARGUMENT

Respondent essentially argues that the provisions of section 921.001, Florida Statutes (1983), which mandates that the guidelines must be utilized for all felonies committed prior to October 1, 1983 but where the sentencing would occur after that date (when the defendant affirmatively elects the guidelines), repeals the provision of section 948.06(1), Florida Statutes (1983) (which grants the trial court the discretion to impose any sentence which it might have originally imposed before placing the probationer or offender on probation). Inasmuch as there is no statutory language, nor any manifestation of legislative intent to indicate such a repeal, respondent's argument must be predicated upon a repeal by implication. As such, respondent's argument would necessarily imply that section 948.06(1) is abrogated for all people who committed felonies before October 1, 1983, and who also violated the probation before that date, but whose sentencing for the violation would be after October 1, 1983.

Assuming for the sake of argument, that the mandate of section 948.06(1) has been repealed by implication, petitioner submits that section 921.001 cannot likewise repeal by implication (or in any manner) the Florida Constitution. Under article X,

section 9, of the Florida Constitution, it states in the pertinent part:

> Repeal or amendment cannot affect prosecution or punishment for any crime previously committed.

(emphasis supplied). When respondent committed the offense and was placed on probation, the trial court had the power to impose any sentence which it might have originally imposed before placing the probationer on that status, i.e., the trial court could have given the respondent up to five (5) years imprisonment but with the possiblility of parole. But under respondent's theory, the language of section 921.001 changes or "effects" the trial courts discretion to impose such a sentence. The trial court now cannot punish the respondent pursuant to the mandate of section 948.06(1); the punishment is now affected by section 921.001, which allows an offender to be sentenced under the guidelines when he so elects.

Petitioner submits, that the latter interpretation by respondent, must fail. To utilize respondent's theory, section 921.001 would violate (at least for purposes of the issue herein) article X, section 9, of the constitution. Yet in State v. Lick, 390 So.2d 52 (Fla. 1980), this court, in upholding the constitutionality of section 796.07(1)(a), Florida Statutes (1977), (the prostitution statute), held that the legislative enactments are presumed to be constitutional. Furthermore, this court held that in Lick:

> Where a statute is reasonably susceptible of two interpretations, one of which would render it invalid and the other valid, we must adopt the constitutional construction.

Id. at 53. Furthermore, in G.W.M. v. State, 391 So.2d 738 (Fla.

4th DCA 1980), it was held that where statutory provisions appear contradictory, it is the duty of the judiciary to adopt, if possible, a construction which harmonized and reconciles these provisions. Id. at 739.

Petitioner submits that sections 921.001 and 948.06(1) can be so harmonized in such a way that both statutes can operate together and in such a way that section 921.001 would be interpreted so as not to violate the Florida Constitution. In order to accomplish this goal, it would be necessary to hold that section 948.06(1), allows the trial court to impose any sentence on a probation violator which it might have originally imposed. Such an interpretation would not preclude or nullify the operation of section 921.001. For example, if an offender has committed a crime before October 1, 1983, but still has not been sentenced as of that date, the statute would still operate. The trial court, under those conditions, could place the offender on probation and if that offender violated his probation, the trial court would have to follow the guidelines, because when the offender was placed on probation, the trial court would be governed by the words of section 948.06(1), i.e., the trial court would have to impose a guideline sentence, because that was the only sentence it could have originally imposed on the defendnat when placing the defendant on probation.

Under Dobbert v. Florida, 432 U.S. 282, 292-293, 97 S.Ct. 2290, 2298-2299, 53 L.Ed.2d 344 (1977), and Paschal v. Wainwright, 738 F.2d 1173 (11th Cir. 1984), the guidelines do not constitute an ex post facto violation because the maximum penalty under the guidelines would be the same as the maximum penalty under the pre-

vious system, but without parole possibility. So it cannot be argued that a punishment is "effected" under article X, section 9, when a defendant elects to be sentenced under the guidelines for a crime committed before October 1, 1983, because he could be electing a more severe penalty. But the guidelines do "effect" a punishment for a violation of probation sentence imposed after October 1, 1983 [assuming the violation determination occurred before October 1, 1983 as in the case at bar]. Although the "effect" does not consist of any ex post facto analysis, the trial court is still "effected" by the guidelines to the extent it cannot ". . . impose any sentence which it might have originally imposed before placing the probationer on probation . . ." pursuant to section 948.06(1). (emphasis supplied).

In Wakulla County v. Davis, 395 So.2d 540 (Fla. 1981), this court explained that a statute cannot be interpreted in a vacuum. This court went on to hold that a law should be construed together and in harmony with any other statute relating to the same purpose, even though the statutes were not enacted at the same time. Id. at 542. As in G.W.M., supra, this court in Davis, explained that where two (2) statutes operate on the same subject without any positive inconsistency or repugnancy, the courts must construe them so as to preserve the force of both without destroying their evident intent if possible. Id. at 542. Further, courts presume that statutes are passed with knowledge of prior existing statutes and that the legislature does not intend to keep contradictory enactments on the books or to effect so important a measure as to repeal a law without expressing an intent to do so. See, Woodgate Development Corporation v. Hamilton Investment Trust, 351

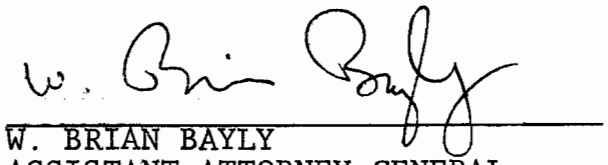
So.2d 14, 16 (Fla. 1977). As indicated supra, there has been no intent expressed or otherwise to vitiate the language of section 948.06(1). Not only can it be presumed that the legislature passed section 921.001 with the knowledge that 948.06(1) existed and that these two (2) statutes were to coexist, but it can be presumed that the legislature had knowledge of article X, section 9, when it passed the guideline statute. To preserve the harmony and effect not only of both statutes, but to harmonize section 921.001 with the Florida Consititution, petitioner submits that the construction offered herein would accomplish such a goal. Consequently, the trial court was correct in "imposing any sentence which it might have originally imposed before placing the probationer . . . on probation" by sentencing the respondent to five (5) years incarceration with the possibility of parole.

CONCLUSION

Based on the arguments and authorities presented herein, petitioner respectfully prays this honorable court reverse the decision of the District Court of Appeal of the State of Florida, Fifth District.

Respectfully submitted,

JIM SMITH
ATTORNEY GENERAL

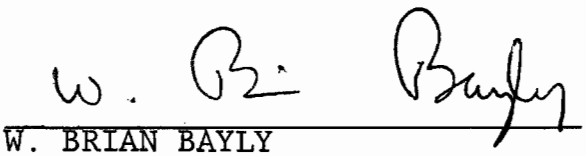


W. BRIAN BAYLY
ASSISTANT ATTORNEY GENERAL
125 N. Ridgewood Avenue
Fourth Floor
Daytona Beach, Florida
(904) 252-2005

COUNSEL FOR PETITIONER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing Reply Brief on the Merits has been furnished, by mail, to James R. Wulchak, Assistant Public Defender for respondent, at 1012 S. Ridgewood Avenue, Daytona Beach, Florida 32014, this 11th day of March, 1985.



W. BRIAN BAYLY
Of Counsel