IN THE SUPREME COURT OF FLORIDA

AURELIO MARQUEZ,

Petitioner,

vs.

CASE NO. 66,827

STATE OF FLORIDA,

Respondent.

_____/

RESPONDENT'S BRIEF ON THE MERITS

JIM SMITH
ATTORNEY GENERAL

LAWRENCE A. KADEN
ASSISTANT ATTORNEY GENERAL

THE CAPITOL
TALLAHASSEE, FLORIDA 32301
(904) 488-0600

COUNSEL FOR RESPONDENT

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PRELIMINARY STATEMENT

Petitioner was the defendant in the trial court, and the appellant in the First District Court of Appeal. The State of Florida was the prosecuting authority in the trial court and the appellee in the First District. The parties will be referred to as they appear before this Court.

References to the record on appeal will be made by use of the symbol "R," followed by the appropriate page number in parentheses.

STATEMENT OF THE CASE AND FACTS

The State accepts Petitioner's statement of the case and facts with the following additions and clarifications. Contrary to Petitioner's assertions, it is not clear from the record that Petitioner did not understand English. All the record reveals is that when the trial court asked at the sentencing hearing whether Petitioner understood any English, his trial counsel stated that he wished "that we would go through the whole proceeding with him and his interpreter." (R 22) Moreover, it is apparent from the pre-sentence investigation which Petitioner included in the supplemental record on appeal that Petitioner was able to speak and understand English. For example, during the armed robbery, Petitioner asked the victim how much a can of coca-cola would cost, and Petitioner told the victim "give me the money or I'll blow your God damn head off." When the victim stepped away from the cash register, Petitioner demanded "open it." Petitioner then told the victim, "if you move, I'll blow your God damn head off." (R 32)

The pre-sentence investigation also revealed that Petitioner denied his guilt and that he had been extremely violent in jail, had collected numerous disciplinary reports, and his behavior had been so bad as to require him to be separated from the other inmates (R 36). The PSI also indicated that Petitioner had lied about his previous arrests and about whether he was married (R 39). Petitioner also lied about whether he had used an alias.

The State filed a sentencing recommendation letter which stated that Petitioner had lied to the Parole and Probation Commission and had been uncooperative with them. The State also informed the court that Petitioner had exhibited violent behavior while at the jail and that Petitioner had shown no remorse and despite the overwhelming evidence, claimed he was innocent (R 42).

SUMMARY OF ARGUMENT

The certified question should not be answered because the issue was not properly preserved in the trial court and because the State argued this theory in the First District. Castor v. State, 365 So.2d 701 (Fla. 1978); State v. Scott, 439 So.2d 219 (Fla. 1983). The failure to preserve the issue in the lower court is not excusable under State v. Rhoden, 448 So.2d 1013 (Fla. 1984), because no mandatory statutory duty was placed upon the trial court. State v. Snow, 462 So.2d 455 (Fla. 1985), and Cofield v. State, 453 So.2d 409 (Fla. 1st DCA 1984).

Assuming only for the sake of argument that the Court excuses Petitioner's procedural default, Petitioner still is not entitled to any relief. This is because there is no constitutional right to parole and thus the standards necessary for a valid waiver of a constitutional right are not applicable.

Similarly, Petitioner is not entitled to any relief under his theory that the law was applied in an unconstitutional ex post facto manner against him. Dobbert v. Florida, 432 U.S. 282, 97 S.Ct. 2290, 53 L.Ed.2d 344 (1977), makes it clear that a law will not be considered ex post facto if it merely allows for a change of procedures and does not affect matters of substance. Although the guidelines are substantive for determining whether a violation of Art. V, Section 2(a) of the Florida Constitution has occurred, the guidelines are procedural for determining whether they are ex post facto. Vaught v. State, 410 So.2d 147 (Fla. 1982). Finally, should

the Court disagree, Petitioner still is not entitled to relief because there is not a silent record. Petitioner's trial counsel affirmatively stated at the sentencing hearing that he had discussed the matter with Petitioner and that Petitioner wished to be sentenced under the guidelines. Under federal law, when a defendant was represented by counsel when he entered his plea, there is a presumption that the plea was a voluntary product of an intelligent and knowing act. United States ex rel. Black v. Russell, 435 F.2d 546 (3d Cir. 1970), cert. denied, 402 U.S. 947 (1971).

Should the Court decide to exercise its discretion to review Petitioner's second issue, Petitioner is not entitled to any relief because the trial court's reasons for deviation were clear and convincing.

ARGUMENT

ISSUE I

THE CERTIFIED QUESTION SHOULD NOT BE REACHED BECAUSE THE ISSUE WAS NOT PRESERVED IN THE TRIAL COURT.

Although the First District certified a question to this Court, this issue was not preserved in the trial court by a contemporaneous objection. Although the State made this default argument in the First District, the First District did not rule on such argument but instead just certified the question.

It is now fundamental that appellate counsel must be bound by the acts of trial counsel. Castor v. State, 365 So.2d 701, 703 (Fla. 1978). An appellate court "will not consider an issue unless it was presented to the lower court." Steinhorst v. State, 412 So.2d 332, 338 (Fla. 1982). Before an argument is cognizable on appeal, "it must be the specific contention asserted as legal ground for the objection, exception, or motion below." Id. Matters not presented to the trial court are waived. State v. Barber, 301 So.2d 7 (Fla. 1974).

In order for an issue to have been properly presented to the trial court, a contemporaneous objection is required. Castor, supra. Such an objection must be specific enough to apprise the trial judge of the putative error and to preserve the issue for intelligent review on appeal. Williams v. State, 414 So.2d 509, 511 (Fla. 1982). Of course, the reason for this is that "[i]t would be wasteful of the court's time and

of the limited resources of the appellate system to deny the sentencing judge the benefit of contemporaneous objections to a sentence and the concomitant opportunity to correct errors at the sentencing hearing." State v. Scott, 439 So.2d 219, 221 (Fla. 1983).

Since there was no objection at all in the trial court on any grounds, the First District should never have reached the issue. Should Petitioner attempt to argue that the issue is cognizable under State v. Rhoden, 448 So.2d 1013 (Fla. 1984), the State would point out that it relied upon Cofield v. State, 453 So.2d 409 (Fla. 1st DCA 1984) which distinguished the situation in Rhoden which involved a mandatory duty placed upon the trial court by statute. Cofield was cited with approval by this Court in State v. Snow, 462 So.2d 455, 456 (Fla. 1985), for the proposition that Rhoden excuses the requirement of a contemporaneous objection only when the trial court violates a mandatory statutory duty. Since no such statutory duty is involved in Petitioner's case, a contemporaneous objection is still required, and under Castor, the issue should not have been considered by the First District.

Assuming only for the sake of argument that the Court decides to answer the question anyway despite the absence of a contemporaneous objection, Petitioner still should not be entitled to any relief. Petitioner has apparently recognized that there is no constitutional right to parole. See, e.g., Greenholtz v. Inmates at the Nebraska Penal and Correctional Complex, 442 U.S. 1, 99 S.Ct. 2100, 60 L.Ed.2d 668 (1979), and

Staton v. Wainwright, 665 F.2d 686 (5th Cir.), cert. denied, 456 U.S. 909, 102 S.Ct. 1757, 72 L.Ed.2d 166 (1982). Parole is not a termination of a sentence or completion of a sentence--it 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, a waiver of parole is distinguishable from a waiver of a constitutional right.

Although Petitioner has not argued that he was deprived of a constitutional right to parole, he has argued that he was the victim of an unconstitutional ex post facto application of the guidelines statute. To support his argument, Petitioner has relied upon Weaver v. Graham, 450 U.S. 24, 101 S.Ct. 960, 67 L.Ed.2d 17 (1981), in which the United States Supreme Court found that Florida's new gain time law, §944.275(1) was ex post facto because it detrimentally changed the legal consequences of acts committed prior to its effective date. Although he has not said so, Petitioner is apparently arguing that since he is not entitled to parole, the new guidelines statute is more onerous for acts which were committed prior to the effective date of the statute. See §921.001(8), Fla. Stat.

However, Petitioner has totally overlooked the United States Supreme Court's opinion in Dobbert v. Florida, 432 U.S. 282, 293, 97 S.Ct. 2290, 53 L.Ed.2d 344 (1977), which held that a law will not be considered ex post facto if it merely allows for "legislative control of remedies and modes of procedure which do not effect matters of substance." The question then becomes whether the new guidelines are procedural

or substantive. In Dobbert, the Court explained that even though a procedural change may work to a defendant's disadvantage, it is not ex post facto. The Court concluded that Florida's death penalty law was not ex post facto as applied to Dobbert because it did not change the ultimate punishment allowed by law, but rather it changed only the procedure by which the sentence could be imposed. In effect the death penalty law constituted "sentencing guidelines" for capital cases. It is the State's position that the guidelines are not more onerous since they do not change the maximum punishments allowed by law for the various crimes.

Should Petitioner attempt to argue that if the State is correct that the guidelines are procedural into an argument that the guidelines violate Art. V, Section 2(a) of the Florida Constitution, the State would point out that a similar argument was rejected by this Court in Vaught v. State, 410 So.2d 147, 149 (Fla. 1982). In that case, the Court held that Florida's revised death penalty statute which had legislatively authorized appellate review, constricted parole eligibility, and provided guidelines to determine the appropriate sentence, were procedural for determining whether the guidelines were ex post facto as applied to persons who committed crimes prior to the effective date of the law, but that they were substantive as that term is applied in Art. V--and thus not a violation of the rule making powers of the Florida Supreme Court.

Thus, it is the State's position that the sentencing guidelines are "procedural" from the standpoint of whether

they may be applied at the time sentence is imposed regardless of when the crime was committed. Dobbert, supra, and Lee v. State, 294 So.2d 305 (Fla. 1974). It should also be pointed out that under Vaught, the guidelines statute is substantive within the meaning of Art. V. The State's argument is supported by the fact that this Court has already recognized that the guidelines are substantive and that they must be approved and implemented by the Legislature before they are effective. See §§921.001(1) and (4)(b), Fla. Stat. See also The Florida Bar: Amendment to Rules of Criminal Procedure (3.701, 3.988--Sentencing Guidelines), 10 F.L.W. 266 (Fla. Apr. 11, 1985), in which the Court specifically recognized that the recent amendments would be effective only if approved by the Legislature.

In summary, Dobbert, supra, makes it clear that a law is not ex post facto if it merely changes the procedure by which sentence may be imposed. Weaver v. Graham is inapplicable to the facts of this case because Weaver involved statutory gain time which increased the defendant's ultimate sentence and thus was more onerous than the law concerning sentencing which was in effect at the time the defendants committed their crimes. The guidelines do not alter the maximum sentence allowed by law and they simply are not more onerous than the situation that existed prior to the adoption of the guidelines.

Therefore, since no constitutional rights have been violated in this case, i.e., no ex post facto violation and no constitutional right to parole, Petitioner's argument crumbles. However, should the Court disagree, the State

would point out that there is not a silent record in Petitioner's case but rather there is an affirmative representation by Petitioner's trial counsel at the sentencing hearing that he had discussed the matter with Petitioner and that Petitioner wished to be sentenced under the guidelines. This is relevant and important because Petitioner has relied upon the federal cases construing what is necessary before a plea can be considered knowing and voluntary under Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969). Under the federal law, which is the law that counsel for Petitioner has asked this Court to consider, when a defendant "was represented by counsel when he entered his plea of guilty, as in the case here, the presumption is that the plea was a voluntary product of an intelligent and knowing act." United States ex rel. Black v. Russell, 435 F.2d 546, 547 (3d Cir. 1970), cert. denied, 402 U.S. 947 (1971). Thus, under federal law, the record is not as silent as Petitioner has suggested. Moreover, Petitioner's argument that a federal constitutional right cannot be waived unless the defendant personally waives such right is incorrect in light of Russell, supra.

ISSUE II

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT IMPOSED A SENTENCE OUTSIDE THE RECOMMENDED GUIDELINES RANGE.

Initially, the State would argue that the Court should not consider this issue because it is not part of the certified question. However, because the State recognizes that the Court has discretion to consider the entire case once it has accepted jurisdiction, the State will address the argument on its merits.

The trial court found that although Petitioner had only been released to a sponsor in the United States since February, 1981, he had already been convicted of one misdemeanor and one previous felony and had served approximately one and one-third years in either county jails or state prisons. Petitioner committed the armed robbery which was before the Court approximately 30 days after his latest release from prison. In Kiser v. State, 455 So.2d 1071 (Fla. 1st DCA 1984), the court upheld a deviation from the guidelines sentence because of the timing of the various offenses. See also Swain v. State, 455 So.2d 533 (Fla. 1st DCA 1984) (deviation upheld based upon the defendant's pattern of committing new crimes shortly after his release from incarceration).

The trial court also justified his reasons for departing from the guidelines by finding that Petitioner had twice threatened the life of the victim during the armed robbery (R 16). Petitioner complains that this is improper

consideration of a factor which was already considered in the scoresheet. The State strongly disagrees--can Petitioner seriously be suggesting that it is not possible to commit an armed robbery without twice threatening to blow the victim's "God damn head off." In Garcia v. State, 454 So.2d 714 (Fla. 1st DCA 1984), the First District rejected the same argument now being advanced by Petitioner. The lower court specifically stated that "the traditional discretion of a sentencing court to consider all facts and circumstances surrounding the criminal conduct of the accused has not been abrogated by adoption of the sentencing guidelines." In that case, the court upheld the trial court's departure which was based in part upon the danger the defendants had caused to both citizens and law enforcement officers during the perpetration of the offense and the subsequent apprehension of the defendants. See also Weems v. State, ___ So.2d ___, 10 F.L.W. 268 (Fla. May 9, 1985).

The trial court also based his departure from the guidelines on the fact that Petitioner "has been untruthful and uncooperative with court personnel conducting the PSI." (R 16) This reason was upheld by the First District in Bogan v. State, 454 So.2d 686 (Fla. 1st DCA 1984).

Finally, the Court should reject Petitioner's contention that the deviation was improper because the trial court relied upon Petitioner's subsequent violent and disruptive behavior in jail. First, there is no proof that Petitioner's conduct in the jail was criminal in nature--indeed, if it had

been, Petitioner probably would have been charged with a crime. Second, and more importantly, the trial court's reliance on Petitioner's disruptive behavior is similar to the already upheld reliance upon a defendant's failure to be rehabilitated. See, e.g., Burke v. State, 456 So.2d 1245 (Fla. 5th DCA 1984), and Higgs v. State, 455 So.2d 451 (Fla. 5th DCA 1984).

The State submits that none of the reasons relied upon by the trial court for deviation were improper. Therefore, regardless of what occurs in Young v. State, 455 So.2d 551 (Fla. 1st DCA 1984), cert. pending, concerning whether a remand is required when a trial court relies upon an improper reason for deviating along with good reasons for deviating, Petitioner still is not entitled to any relief.

CONCLUSION

The State respectfully submits that the Court should decline to answer the certified question because it was not properly preserved in the lower court and because the failure to make a contemporaneous objection is not excused under State v. Rhoden, supra. However, if the question is answered, it is the State's position that there was no violation of any constitutional right because the guidelines statute is not ex post facto because it merely changes the procedure by which sentence may be imposed rather than the maximum sentence itself. Since there was no violation of any constitutional right, it follows that the standards for waiver of a constitutional right simply are inapplicable.

Should the Court exercise its discretion to consider the second issue, it is the State's position that the reasons for deviation were proper under the cases cited.

Respectfully submitted,

JIM SMITH
ATTORNEY GENERAL

Lawrence A. Kaden
LAWRENCE A. KADEN
Assistant Attorney General

The Capitol
Tallahassee, Florida 32301
(904) 488-0600

COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by hand to Paula S. Saunders, Assistant Public Defender, Post Office Box 671, Tallahassee, Florida, 32302, on this 20th day of May, 1985.

Lawrence A. Kaden

LAWRENCE A. KADEN

OF COUNSEL