IN THE FLORIDA SUPREME COURT

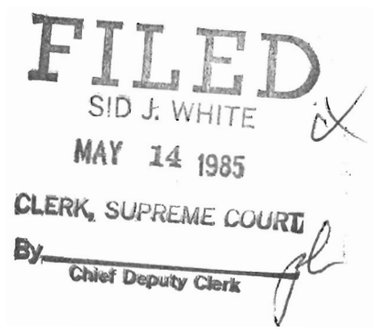
RONNIE DEWEY BROWN,

Petitioner,

v. CASE NO. 66, 921

STATE OF FLORIDA,

Respondent.



PETITIONER'S BRIEF ON THE MERITS

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PETITIONER'S BRIEF ON THE MERITS

I PRELIMINARY STATEMENT

This appeal results from a decision of the First District Court of Appeal, Brown v. State, 10 FLW 400, (Fla. 1st DCA February 12, 1985). Petitioner will refer to documents in the appendix by the symbol "App." A copy of the opinion is enclosed in the appendix.

This appeal is a consolidation of two criminal cases originating in the Circuit Court of Okaloosa County. Two separately bound and numbered records have been prepared. References to the pages in the separate records will be preceded by the symbol "A" for the case pertaining to the assault charges and "T" for the case pertaining to the theft.

II STATEMENT OF THE CASE AND FACTS

Petitioner was charged in one information with aggravated assault, aggravated battery, shooting into an occupied vehicle and carrying a concealed firearm (A 1-2). In another information he was charged with armed burglary of a structure, trafficking in firearms, and grand theft of firearms valued at $20,000 or more (T 1-3).

At a consolidated hearing on the two informations petitioner pled nolo contendere to aggravated battery, aggravated assault and carrying a concealed firearm in the assault case and nolo contendere to unarmed burglary of a structure, dealing in stolen property and grand theft of property valued at over $20,000 in the theft case (A 29-30).

The court inquired of petitioner about his understanding of the plea and the possible penalty. It was agreed that petitioner could be subjected to only one minimum mandatory three year sentence under §775.087(2) because the aggravated battery and aggravated assualt arose from the same set of circumstances (A 23-33).

The factual basis for the pleas was described as follows:

> MR. GRINSTED: Judge, the State is prepared to prove on Case 83-1103, that on June 24, 1983 Stuart Sporting Goods Store was broken into with over twenty-thousand dollars worth of forearms and merchandise stolen out of that. On that very same day, this defendant and two other subjects, one known by the name of McLean and one by the name of Aguillar, sold a large number of these guns, twenty-five of them to James Boyett, Dennis Barber and Larry Fonte. The guns were recovered and identified as coming from the burglary. McLean later admitted to Mr. Boyett that he, the defendant and Mr. Aguillar burglarized the building by punching a hole in the cement floor.

> Stewart's Sporting Goods was broken into by punching a hole in the cement floor. Mr. McLean also stated that although he and Mr. Aguillar went inside, that this defendant, Ronnie Brown, acted as the lookout in the case. That offense occurred in Okaloosa County, Florida.
>
> As far as Case 83-1089, the State is prepared to prove that on August 28, 1983, that at the Taco Rancho on Elgin Parkway, Mr. Ronnie Brown got into a confrontation with some individuals by the name of Martin Wilson and David Gurley. During this confrontation Mr. Brown pulled out a firearm which he had concealed in a scabbard hung over his shoulder, took the firearm and pointed it at Martin Wilson, at his face, and said words to the effect that "your life is not worth fifty cents." Mr. Wilson took off running and Mr. Brown chased after him. Three other individuals that were with Mr. Wilson at that time got into their [car] to go chase down the victim in that case, Martin Wilson, and the defendant Ronnie Brown. When the got up to Brown and Wilson, they stopped the car. Mr. Brown took a couple of shots at Mr. Wilson there, then he turned the gun on to the car and fired into the car, hitting David Gurley in the side of the head. Those offenses occurred in Okaloosa County, also.
>
> (A 35,36).

Upon inquiry by the judge, petitioner's counsel said that "the negotiation really was built around the [sentencing] guidelines and the defendant desires to accept the guidelines" (A 36-37). A presentence investigation report was prepared and is included in the record (A 56-67).

At the sentencing hearing the parties agreed to the accuracy of a guidelines scoresheet, in which petitioner received 203 points, with a recommended range of sentence between four and a half to five and a half years incarceration (A 44).

After settling on the proper scoring, the trial judge said:

> JUDGE: Gentlemen, the Court has indicated in the past in counsels' presence, some

> problems with the sentencing guidelines in some circumstances. And the Court in this case finds, after long discussions with counsel and after completing a technically correct sentencing guideline sheet, that the recommended sentence in this case is four and a-half tofive and a-half years.
>
> The Court finds that this sentence is, in this particular case, inadequate punishment for the defendant's prior behavior.
>
> (A 45).

The court departed from the guidelines and imposed a total sentence of 40 years, giving petitioner five years for aggravated assault, 15 years for aggravated battery, and five years for carrying a concealed firearm, all to run consecutively and five years each on the burglary, theft and trafficking charges, also to run consecutively. The sentencing form for the consecutively imposed sentences for aggravated battery and aggravated assault indicate that the three year minimum mandatory for possession of a firearm applies (R 14-15).

After the sentence was announced petitioner attempted to withdraw the election for guideline sentencing, but the request was denied (A 51).

The court's written reasons for departing from the guidelines were:

> The guidelines recommend a sentence of 4 1/1 - 5 1/2 years (202 points). The Court finds that this recommended sentence is inadequate punishment for the Defendant's prior behavior. The Court further finds clear, convincing and compelling reasons for deviating from said guidelines. The Defendant's record indicates prior convictions on eight three (sic) degree felonies and three misdemeanors, some of which involve violent behavior. In the present case the Defendant, without provocation, shot into a car toward four innocent people, one of whom was a female nine months pregnant. He fired one into the car repeatedly until he wounded one of the occupants. He committed this act approximately two months

> after committing a burglary involving over $20,000.00 worth of firearms, some of which were hand guns. The Defendant displays no remorse for his behavior. Since 1977, he has been on probation, been in prison and been on parole. His behavior has not improved. The Defendant's prior actions indicate that he is a dangerous person with no respect for the law, and a menace to society.
>
> (T 16).

The First District Court of Appeal held that if a defendant "affirmatively selects " to be sentenced pursuant to the guidelines, it is not necessary that there be a showing that he voluntarily waived his parole eligibility. (App.) In so holding, the Court recognized there were "meritorious arguments with respect to both sides of this issue" and certified the following question as one of great public importance:

> WHETHER A DEFENDANT'S CONSTITUTIONAL RIGHT OF PROTECTION AGAINST EX POST FACTO LAWS IS VIOLATED WHEN HE AFFIRMATIVELY SELECTS, PURSUANT TO SECTION 921.001(4)(a), FLORIDA STATUTES (1983), TO BE SENTENCED PURSUANT TO THE GUIDELINES BUT THERE IS NO SHOWING IN THE RECORD THAT THE COURT EXPLAINED THAT BY SELECTING GUIDELINES SENTENCING THE DEFENDANT WAIVES HIS ELIGIBILITY FOR PAROLE.
>
> (App).

The First District also rejected petitioner's argument concerning his conviction and sentence for both theft and dealing in stolen property because the same firearms were the subject of both offenses. (App). The Court held that Section 812.025, Florida Statutes, is inapplicable when a defendant pleads to both offenses pursuant to a plea bargaining agreement. (App).

III SUMMARY OF ARGUMENT

Petitioner contends the record does not show that in electing a guidelines sentence he knowingly and intelligently waived the protection against ex post facto application of laws. Petitioner also contends that Section 812.025, Florida Statutes, prohibits his conviction and sentence for grand theft and dealing in stolen property in connection of one scheme or course of conduct.

IV ARGUMENT

ISSUE I

THE PETITIONER'S SENTENCE UNDER THE GUIDELINES SHOULD BE VACATED BECAUSE THE RECORD DOES NOT SHOW THAT IN ELECTING A GUIDELINES SENTENCE HE KNOWINGLY AND INTELLIGENTLY WAIVED THE PROTECTION AGAINST EX POST FACTO APPLICATION OF LAWS.

Petitioner had the option of electing sentencing under the guidelines promulgated as Fla.R.Cr.P. 3.701 or under the law as it existed before October 1, 1983. A major difference between the two options was that defendants electing guidelines would not be eligible for parole. §921.001(8), Fla.Stat. (1983).

Petitioner's crimes occurred before October 1, 1983, when offenders had a right to parole consideration. Loss of that right is "disadvantageous" and, if applied retroactively, the deprivation constitutes an ex post facto application of the law. State v. Williams, 397 So.2d 663 (Fla. 1981); cf., Weaver v. Graham, 450 U.S. 24 (1981)(retroactive diminution of gain time credits violated prohibition against ex post facto laws).

Petitioner never acknowledged that he had been informed of the right to elect whether to be sentenced under the guidelines or that by doing so he lost the right to parole. Without that knwoledge, the election announced by counsel could not have been a truly voluntary waiver of the protection against ex post facto laws. It is impermissible to presume waiver of a constitutional right from a silent record. Carnley v. Cochran, 369 U.S. 506 (1962); Boykin v. Alabama, 395 U.S. 238 (1969). The record is silent on the issue of whether petitioner understood that by electing to be sentenced under the guidelines he was relinquishing

the statutory right to parole consideration, and also the constitutional right not to lose that statutory right by an ex post facto enactment. The election, therefore, is constitutionally deficient.

The protection against ex post facto application of the law is founded upon guarantees of the Florida and federal constitutions.[1] These rights were personal to petitioner and a waiver of them cannot be presumed when the record is silent.[2] The remarks of petitioner's counsel making the selection on petitioner's behalf do not amount to a knowing and intelligent waiver by petitioner of ex post facto protections.

When considering the constitutional rights waived by a plea of guilty the United States Supreme Court has firmly declared that a silent record will not suffice. Boykin v. Alabama, 395 U.S. 238 (1969). Represented by counsel, Boykin was asked no questions by the judge and did not address the court. After listing the federal constitutional rights waived by a guilty plea the Court said:

> What is at stake for an accused facing death or imprisonment demands the utmost solicitude of which courts are capable in canvassing the matter with the accused to make sure he has a full understanding of what the plea connotes and of its consequence. (Emphasis added).
>
> 395 U.S. at 243, 244.

Thus it was error, plain on the face of the record, for the court to have accepted the guilty plea "without an affirmative showing that it was intelligent and voluntary". Id., at 242.

1/ Art. 1, §§ 9, 10 United States Const.; Art. 1, §10, Fla. Const.

2/ See, Harris v. State, 436 So.2d 787 (Fla. 1983); Brookhart v. Janis, 384 U.S. 1 (1966).

In Barker v. Wingo, 407 U.S. 514 (1972) the Court dismissed the doctrine of waiver in connection with the Sixth Amendment right to a speedy trial. Rejecting the argument that without a demand the accused should be presumed to have wiaved the right to a speedy trial the Court said:

> Such an approach, by presuming a waiver of a fundamental right from inaction, is inconsistent with this Court's pronouncements on waiver of constitutional rights. The Court has defined waiver as "an intentional relinquishment or abandonment of a known right or privliege." Johnson v. Zerbst, 304 U.S. 458, 464 (1938). Courts should "indulge every reasonable presumption against waiver," Aetna Insurance Company v. Kennedy, 301 U.S. 389, 393 (1937), and they should "not presume acquiescence in the loss of fundamental rights." Ohio Bell Telephone Company v. Public Utilities Commission, 301 U.S. 292, 307 (1937). 407 U.S. at 525, 526.

Neither the Supreme Court by rule or the legislature by statute enacted any procedure for making and recording a "selection" of a guidelines sentence. Even without a rule or statute, the trial judge is required by force of the United States Constitution to insure that the waiver of constitutional rights inherent in a selection of guidelines sentencing is voluntary and intelligent. The silent record in this case does not suffice.

What happened to petitioner here is best described as a classic sandbag. Petitioner pled nolo to several serious offenses in reliance on negotiations that were built around the guidelines. He was never informed on the record that even for a sentence within the guidelines he was giving up the right to parole; nor was he told on the record that the judge could deviate from the guidelines and impose whatever sentence was authorized by law and even then he still would have lost his parole eligibility. The trial

judge, on the other hand, had to have known before he pronounced the sentence that he was going to exceed the guidelines. He also knew that the nolo pleas were made with the expectation of a guidelines sentence. Yet, without insuring that petitioner's waiver of ex post facto rights was made knowingly, the judge drastically departed from the guidelines. Basic fairness dictates that the petitioner should have been given some warnings of his rights, or the option to withdraw the election. How can it be justice for a judge to allow an unknowing waiver of a constitutional right to be made in reliance upon an expected benefit and then, without warning, take away both the right and the benefit?[3]

The remedy for the ex post facto violation in this case is a new sentencing hearing with petitioner being given an opportunity to make a knowing and intelligent election whether to waive the right to parole consideration in exchange for a sentence

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3/ Fla.R.Cr.P. 3.172(g) offers a helpful parallel to the procedure which should have been followed after the trial judge decided he could not sentence within the guidelines. The rule states:

> Should the trial judge not concur in a tendered plea of guilty or nolo contendere arising from negotiations, the plea may be withdrawn.

Perhaps even more pertinent is Fla.R.Cr.P. 3.171(d) which openly and fairly states:

> After an agreement on a plea has been reached, the trial judge may have make known to him the agreement and reasons therefore prior to the acceptance of the plea. Thereafter, he shall advise the parties of whether other factors (unknown at the time) may make his concurrence impossible. (Emphasis added).

imposed under the guidelines. It is not argued here that petitioner would necessarily have to be given the sentence which the guidelines score indicates. He is entitled, however, to be fully informed of the consequences of the selection, the most significant of which is parole ineligibility. Without that knowledge the purported waiver, exposing him to a retoractivity applied enhance penalty, violated due process and was void. The sentence should be vacated and remanded for petitioner to make a voluntary and intelligent election.

ISSUE II

PETITIONER WAS CONVICTED OF BOTH THEFT AND TRAFFICKING INVOLVING THE SAME STOLEN PROPERTY IN VIOLATION OF SECTION 812.025, FLORIDA STATUTES.

Petitioner was charged with stealing and trafficking in firearms. The factual basis for the nolo contendere plea to both charges was that the same firearms were the subject of both offenses and were disposed of within one day of the theft.

Section 812.025, Fla.Stat. (1981) states:

> Charging theft and dealing in stolen property. Nothwithstanding any other provision of law, a single indictment or information may, under proper circumstances, charge theft and dealing in stolen property in connection with one scheme or course of conduct in separate counts that may be consolidated for trial, but the trier of fact may return a guilty verdict on one or other, but not both, of the counts.

Dealing in stolen property is proscribed by §812.019, Fla. Stat. (9181). Obviously the legislative intent in passing §812. 025 was to prevent a person from being convicted of both stealing and trafficking in the same property. The District Court of Appeal held the statute to be limited to cases involving a jury verdict. (App.). The Court found that since petitioner had plead nolo contendere to both charges pursuant to a plea bargaining agreement, the statute was inapplicable. (App).

In Lennear v. State, 424 So.2d 151 (Fla. 5th DCA 1981) the defendant was convicted of grand theft and dealing in stolen property. As in this case, the evidence showed only one scheme or course of conduct involving the theft and sale of the property. Reversing the theft conviction the Court said:

> The State argues that two crimes were committed, not one, and thus multiple convic-

> tions and sentences are permissible under section 775.021(4), Florida Statutes (1981). From a double jeopardy standpoint, the State's position seems to be correct, and without section 812.025, both convictions and sentences would appear to be proper. But, the legislature has the right to define crimes and provide for their punishment. Whalen v. United States, 445 U.S. 684, 689, 100 S.Ct. 1432, 1436, 63 L.Ed.2d 715 (1980), and so must control, especially in view of the clear intention that it apply "Notwithstanding any other provision of law . . . ." (footnote omitted).
>
> 424 So.2d at 153.

In Cleaves v. State, 450 So.2d 511 (Fla. 2d DCA 1984), the Second District Court of Appeal indicated if the facts clearly showed one scheme or course of conduct a defendant could not be convicted and sentenced for both theft and dealing in stolen property. In Cleaves the Court found the record was insufficient to determine any facts as to the underlying crimes. The assistant state attorney gave the factual basis for the plea at the hearing, showing that both the theft and the dealing in stolen property arose from one scheme or course of events.

Petitioner's conviction and sentence for the grand theft charge must be reversed.

V CONCLUSION

For the reasons and authorities set forth, petitioner respectfully requests his convictions and sentences be reversed and a new trial be ordered in this cause.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above Petitioner's Brief on the Merits has been furnished by hand delivery to Assistant Attorney Gregory Costas, The Capitol, Tallahassee, Florida, 32301; and to petitioner, Ronnie Dewey Brown, #909250, Post Office Box 1500, Cross City, Florida, 32628 on this 14th day of May, 1985.

Larry G. Bryant

LARRY G. BRYANT