

IN THE SUPREME COURT OF FLORIDA

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STATE OF FLORIDA,)
)
 Petitioner,)
)
 v.)
)
 THEODORE J. MOTT,)
)
 Respondent.)
 _____)

CASE NO. 67,278

PETITIONER'S BRIEF ON THE MERITS

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STATEMENT OF CASE AND FACTS

The state filed an information in the Circuit Court for Putnam County on April 11, 1984, charging the respondent with escape, in violation of section 944.40, Florida Statutes. (R 27)

On June 21, 1984, Mott entered a plea of guilty to the charge, (R 61) the facts showing that while serving a sentence at the East Palatka Road Prison, Mott escaped on March 18, 1984. (R 64)

Mott was sentenced on September 5, 1984 using a Category Nine scoresheet, as revised by the amendments to the guidelines, effective July 1, 1984. (R 50) Calculation thereunder yielded a recommended guidelines sentence of twelve to seventeen years. (R 50) Mott was sentenced to fifteen years imprisonment, the maximum allowed by law. (R 47)

Mott appealed his sentence to the Fifth District Court of Appeal contending that since the guidelines in effect at the time he was sentenced were amended subsequent to the date he committed the escape, he should have been entitled to the former guideline considerations. A calculation under the prior guidelines would have yielded a recommended sentence of nine to twelve years.

On May 30, 1985, the district court issued its opinion holding that the use of the amended guidelines represented an ex post facto application of law and was thus in violation of the state and federal constitutions. The court

remanded the cause to the trial court with directions that sentencing be calculated under the guidelines in effect at the time of the commission of the offense.

On June 27, 1985, the State of Florida filed its notice to invoke the discretionary jurisdiction of this court and on January 10, 1985, this court ordered that the cause would be accepted for jurisdiction without oral argument. The cause is thus before the court.

SUMMARY OF ARGUMENT

The sentencing guidelines are advisory creatures designed to guide the discretion of sentencing judges. Such guidance should be and is reflective of current attitudes towards criminal punishment. Since a defendant can only rely on the constitutional right not to be sentenced in excess of the clear and established statutory maximum, an amendment to sentencing guidelines which does in no way affect such maximum does not violate the constitutional proscription against ex post facto application of law.

QUESTION PRESENTED

DOES THE UTILIZATION OF AN AMENDMENT TO THE SENTENCING GUIDELINES WHICH OCCURRED AFTER THE COMMISSION OF AN OFFENSE AND RESULTS IN A HIGHER RECOMMENDED SENTENCING RANGE REPRESENT AN ACT IN VIOLATION OF THE EX POST FACTO DOCTRINE OF THE FEDERAL AND STATE CONSTITUTIONS?

ARGUMENT

When Mott committed the offense of escape in March of 1984, the maximum allowable sentence was fifteen years imprisonment. §§944.40; 775.082, Fla. Stat. (1983). When Mott was sentenced for that offense in September of 1984, the maximum sentence was still fifteen years imprisonment.

The only thing that changed between the date of the escape and the sentencing therefor was the amendment to the sentence guidelines. [451 So.2d 824 (Fla. 1984)] Before the amendment, a calculation under the existing scoresheet for a Category Nine offense would have resulted in two hundred and forty-nine (249) sentencing points, or a recommended range of nine to twelve years imprisonment.

By virtue of the amendment and the consequent addition of weighting prior convictions in excess of the number four, fifty-two (52) additional points were assessed against Mott for a recommended range of twelve to seventeen years.

Despite the different recommended ranges mentioned above, the only constitutional guarantee that Mott enjoyed

was the right not to be sentenced in excess of the statutory maximum, or fifteen years imprisonment.

The Supreme Court has clearly held that the ex post facto doctrine of the federal constitution is activated only when a criminal penal law is applied to acts or events occurring before its enactment. What's more, the application must actually disadvantage the offender to the extent that, in this instance, it must increase the punishment previously prescribed for the offense. Weaver v. Graham, 450 U.S. 24, 101 S.Ct. 960, 67 L.Ed.2d. 17 (1981).

This controlling factor was recognized as controlling the issue involved in State v. Jackson, 478 So.2d 1054 (Fla. 1985). In the clearest of language, this court held that amendments to guidelines are procedural changes and do not in any way alter the statutory limits of the sentence which can be imposed for a particular offense. The amendatory procedure regarding sentencing guidelines was likened to the procedural change which produced Florida's current capital sentencing scheme. While we now arrive at the decision to impose the sentence of death under new and different procedural avenues, the ultimate sentence has never changed. Dobbert v. Florida, 432 U.S. 282, 97 S.Ct. 2290, 53 L.Ed.2d 344 (1977).

Conceptually, these principles apply with equal force to this case. While the procedural calculations change with regard to Mott's recommended sentence, the

statutory maximum was left untouched. It would have been no different had the amendment resulted in a recommended range lower than that in effect at the time the escape was committed.

Mott could argue that since a recommended range at the time he committed the offense was nine to twelve years, that he had a right to be sentenced accordingly. We would argue, however, that this "right" would be better characterized only as an expectation, and an uncertain one at best. Whether before or now, guidelines are advisory only; a sentencing judge can always depart, up to the maximum, provided sufficient reasons exist and are relied upon. Since it has been held that a defendant is not entitled to be told prior to sentencing that a departure is contemplated, Mincey v. State, 460 So.2d 396 (Fla. 1st DCA 1984), the very most that Mott, or any other defendant, possesses at the time an offense is committed is the hope that a sentencing judge will stay within a recommended range and not depart to the maximum. Such a hope or expectation is insufficient to trigger application of the ex post facto doctrine. May v. Florida Parole and Probation Commission, 435 So.2d 834 (Fla. 1983).

Mott also may attempt to distinguish State v. Jackson, supra, on the grounds that it involved a change in scoring a probation violation. While that is true, it is a distinction without a compelling difference since the holding of Jackson was not predicated on the probation violation.

At the basis of this court's decision was the fact that the change in recommended range did not change the statutory limit.

It is conceivable that the sentencing guidelines will be amended from time to time. Such amendments will obviously affect the desire and need to sentence convicted defendants in accordance with prevailing notions of justice. Provided that the changes do not result in an actual increase in sentence, no consideration of the ex post facto doctrine should be indicated.

CONCLUSION

Based on the above and foregoing, the state respectfully requests the court to quash the decision of the Fifth District Court of Appeal and hold that the sentencing guidelines in effect at the time of sentencing are to be utilized. Jackson, supra.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Petitioner's Brief on the Merits has been furnished by mail to Nancye R. Crouch, Assistant Public Defender, Attorney for Respondent, 112 Orange Avenue, Suite A, Daytona Beach, Florida, 32014, this 28th day of January, 1986.



Of Counsel