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IN THE SUPREME COURT OF FLORIDA

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CLERK, SUPREME COURT

By 
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STATE OF FLORIDA ,
Petitioner,

v.

CASE NO. 67,281

GARY MOORE,
Respondent.

PETITIONER'S BRIEF ON THE MERITS

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STATEMENT OF CASE AND FACTS

Respondent Moore was charged on May 15, 1984, with committing a lewd and lascivious assault upon an eleven year old child. (R 5) The date of the offense was specified as April 2, 1984.

On June 21, 1984, Moore pled guilty to the offense as charged, (R 31-39) and on September 5, 1984, he appeared for sentencing. Utilizing a calculation under the sentencing guidelines as amended at that time, the recommended guidelines sentence was three years incarceration. (R 20-21)

Counsel for Moore objected to the utilization of the amended guidelines contending that the guidelines in effect at the time of the offense should have been used. (R 42)

The trial court adjudged Moore guilty and sentenced him to three and one-half years imprisonment with credit for time previously served. (R 15)

An appeal was taken to the Fifth District Court of Appeal and on May 30, 1985, that court issued its decision holding that the utilization of the guidelines in effect at the time of sentencing represented a violation of the ex post facto clause of both the federal and state constitutions. Moore v. State, 469 So.2d 947 (Fla. 5th DCA 1985).

On June 27, 1985, the state filed its notice to invoke the discretionary jurisdiction of this court and on January 24, 1986, an order accepting jurisdiction was entered and the cause is now 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

On April 2, 1984, when Moore committed the lewd and lascivious assault upon the child, the maximum allowable sentence was fifteen years imprisonment. §§ 800.04; 775.082 Fla. Stat. (1983). In September of 1984, when Moore was sentenced for that crime, the maximum was still fifteen years imprisonment.

Under the grid which was in effect prior to the effective date of the amendment to the guidelines, [451 So.2d 824 (Fla. 1984)] the recommended guidelines sentence would have been any non-state prison sanction. By virtue of the amendment, the recommended range of the offense was two and one-half to three and one-half years incarceration.

Despite the different recommended ranges mentioned above, the only constitutional guarantee that Moore 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 critical concept 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 changed with regard to Moore'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 offense was committed.

Moore could argue that since a recommended range at the time he committed the offense was any non-state prison sanction, that he had the right to be sentenced accordingly. We 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 Moore, 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).

Moore 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 copy of the foregoing Petitioner's Brief on the Merits has been furnished, by mail, to Christopher S. Quarles, Assistant Public Defender for respondent, 112 Orange Avenue, Suite A, Daytona Beach, Florida 32014, this 11 day of February, 1986.



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