IN THE SUPREME COURT OF FLORIDA

LEROY STEVEN BRADLEY,

Petitioner,

v.

CASE NO. 67,290

STATE OF FLORIDA,

Respondent.

PETITIONER'S BRIEF ON THE MERITS

MICHAEL E. ALLEN
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

PAULA S. SAUNDERS
ASSISTANT PUBLIC DEFENDER
POST OFFICE BOX 671
TALLAHASSEE, FLORIDA 32302
(904) 488-2458

ATTORNEY FOR PETITIONER

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PETITIONER'S BRIEF ON THE MERITS

I 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 prosecution and appellee in the courts below. References to the parties will be as they appear before this Court.

The one volume record on appeal will be referred to herein as "R" followed by the appropriate page number in parentheses. The two volume transcript of proceedings below will be referred to as "T". Petitioner is filing an appendix herewith containing a copy of the opinion of the District Court of Appeal and petitioner's motion for rehearing. References to the appendix will be by the symbol "A" followed by the appropriate page number.

II STATEMENT OF THE CASE AND FACTS

By information filed October 7, 1985, petitioner was charged with two counts of armed robbery and one count of attempted robbery, which offenses allegedly occurred on September 27, 1983 (R 7-8).

Petitioner was tried by jury on March 6-7, 1984, and found guilty as charged on all three counts (R 25-27; T-363).

At the sentencing hearing on May 23, 1984, petitioner affirmatively elected to be sentenced under the sentencing guidelines (T 370-371). The state filed a "notice of intent to seek a sentence in excess of the sentencing guidelines" (R 30-31), which was addressed at the sentencing hearing (T-374-378). The trial court departed from the recommended guidelines range of 22 to 27 years (R 39) and imposed consecutive sentences of 30 years in prison on each of two counts of armed robbery and 10 years in prison on one count of attempted armed robbery, for a total of 70 years incarceration (R 33-39). The trial court also retained jurisdiction over one-third of the total sentence, or 23 1/3 years, pursuant to Section 947.16, Florida Statutes (1983) (R 40-49; T 380-384).

On appeal to the District Court of Appeal, First District, petitioner argued, inter alia, that his election was not knowingly and intelligently made, since he was not fully informed of the consequences of his election, i.e., waiver of his right to parole, and, in fact, was misled into believing he was still eligible for parole consideration

since the trial court retained jurisdiction. The district court disagreed, citing its prior decision in Moore v. State, 455 So.2d 535 (Fla. 1st DCA 1984), but certified the following question as one of great public importance:

> When a defendant who committed a crime before 1 October 1983 affirmatively selects sentencing pursuant to the sentencing guidelines, must the record show the defendant knowingly and intelligently waived the right to parole eligibility?

(A 2). The court, however, vacated petitioner's sentences and remanded for resentencing because the trial court improperly retained jurisdiction. The court recognized that retention serves no purpose because a defendant sentenced pursuant to the sentencing guidelines is ineligible for parole and found:

> [T]he record clearly shows the trial court was under the mistaken impression that Bradley would be eligible for parole despite his affirmative selection to be sentenced pursuant to the guidelines. We hesitate to affirm a lengthy sentence which the trial court may not have imposed had it known the defendant would not be eligible for parole.

(A 2). The court further held that because petitioner had affirmatively selected guidelines sentencing, he could not withdraw that election on remand.

Petitioner timely filed for rehearing (A 3-6), arguing that if the sentencing procedure was tainted by the trial judge's misconception that a departure from the guidelines constitutes a non-guidelines sentence for which petitioner

would be eligible for parole, the selection process was likewise tainted since petitioner was affirmatively misled as to the effect of a departure on his parole eligibility. Petitioner requested that he be allowed to withdraw his election on remand. Petitioner's motion for rehearing was denied by order dated May 30, 1985 (A 7).

On June 28, 1985, petitioner filed a notice to invoke this Court's discretionary jurisdiction. This appeal follows.

III SUMMARY OF ARGUMENT

The District Court of Appeal, First District, certified as a question of great public importance whether or not election to be sentenced pursuant to the sentencing guidelines must be knowing and intelligent. Petitioner contends that because a defendant who elects to be sentenced under the guidelines necessarily waives the valuable right -- the right to parole, the election must be made with the knowledge and understanding that the defendant is giving up his right to parole eligibility. The district court's certified question should be answered in the affirmative.

IV ARGUMENT

ISSUE I

WHEN A DEFENDANT WHO COMMITTED A CRIME BEFORE 1 OCTOBER 1983 AFFIRMATIVELY SELECTS SENTENCING PURSUANT TO THE SENTENCING GUIDELINES, THE RECORD MUST SHOW THE DEFENDANT KNOWINGLY AND INTELLIGENTLY WAIVED THE RIGHT TO PAROLE ELIGIBILITY.[1]

Petitioner's offenses were committed on September 27, 1983. Persons whose crimes were committed before October 1, 1983, but whose sentences were imposed after that date could affirmatively select to be sentenced under the guidelines. In Re Rules of Criminal Procedure (Sentencing Guidelines), 439 So.2d 848 (Fla. 1983). Persons sentenced under the guidelines are not eligible for parole. Section 921.001(8), Florida Statutes (1983).

Petitioner enjoyed the right to consideration for parole at the time his offenses were committed. By being sentenced under the guidelines, petitioner lost that right, although he was never informed that he was giving up the right to parole consideration and, in fact, was misled into believing he was still eligible for parole by the trial court's purported retention of jurisdiction. The facts involved here bring into sharp focus the need for a knowing and intelligent election to be sentenced under the

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[1] This certified question is currently pending before the Court in Gage v. State, Case No. 66,389, Cochran v. State, Case No. 66,388, and Marquez v. State, Case No. 66,827.

guidelines, as opposed to merely an "affirmatively" election.

At the sentencing hearing below, petitioner's counsel indicated that he conferred with petitioner and Mr. Bradley selected guidelines sentencing. There was no discussion on the record whether petitioner understood that by electing the guidelines he was waiving his right to parole, and any such understanding was negated by the trial court's "Order Directed to Parole Commission" and statement of "Authority for Retained Jurisdiction" (R 45-49). The trial court clearly misperceived Section 921.001(8), Florida Statutes, by sentencing petitioner pursuant to the guidelines, departing and then retaining jurisdiction over petitioner's parole for 23.3 years. If the trial court so clearly misunderstood the impact of the statute, it cannot be assumed that petitioner had any greater insight and knowingly and intelligently waived his rights to parole.

Legislative restriction of the statutory right to be considered for parole violates the ex post facto clauses of both the state and federal constitutions, Art. I, § 9, 10 United States Constitution and Art. I, § 10 Florida Constitution, if applied to persons whose offenses occurred prior to the effective date of the act imposing the restrictions. For example, in State v. Williams, 397 So.2d 663 (Fla. 1981), this Court held that Section 947.16 (3), Florida Statutes, authorizing retention of jurisdiction

by the trial judge to vacate a parole order, had disadvantageous consequences and therefore when applied to persons whose crimes occurred before the act became effective was a prohibited ex post facto law.

In Weaver v. Graham, 450 U.S. 24 (1981) the United States Supreme Court held that a statute decreasing gain time credits was retroactive in application and therefore violated the ex post facto clause of the constitution, saying:

> We need not determine whether the prospect of the gain time was in some tactical sense part of the sentence to conclude that it in fact is one determinant of petitioner's prison term - and that his effective sentence is altered once this determinant is changed. [Citations omitted]. See also Rodriguez v. United States Parole Commission, 594 F.2d 170 (CA 7 1979)(elimination of parole eligibility held an ex post facto violation). We have previously recognized a prisoner's eligibility for reduced imprisonment is a significant factor entering into both the defendant's decision to plea bargain and the judge's calculation of the sentence to be imposed.

450 U.S. at 31-32.

A fundamental principles of law is that a waiver of constitutional rights cannot be presumed from a silent record. Carnley v. Cochran, 369 U.S. 508 (1962); Boykin v. Alabama, 395 U.S. 238 (1969). The record fails to show that petitioner knew or understood that in exchange for selecting guidelines sentencing he was giving up the

right to parole consideration at any time during the sentencing hearing.

The legislature and this Court have both stated that a defendant could elect sentencing under the guidelines. No procedure, however, was suggested or adopted for making that election as a matter of record. Because the election inherently involves waiver of a constitutional right, the record of that election must show a knowing and voluntary and intelligent waiver, in the same manner as the record of a guilty plea must show the waiver of certain constitutional rights given at that time. Florida Rule of Criminal Procedure 3.172 (c)(iii). Moreover, the court is required by that rule to inform the defendant of any minimum sentences or portions of sentences during which there is no parole eligibility. Florida Rule of Criminal Procedure 3.172(c) (i); Peak v. State, 399 So.2d 1043 (Fla. 5th DCA 1981). A plea which is defective in non-compliance with this rule is vulnerable to attack. Williams v. State, 316 So.2d 267 (Fla. 1975).

In State v. Green, 421 So.2d 508 (Fla. 1982), the issue was whether it was error to deny a motion to vacate a sentence after a guilty plea in which the trial judge had failed to inform the defendant of the possibility of retaining jurisdiction to vacate parole during one-third of his sentence. This Court held that the lack of a proper advisement of the consequences of

the plea was reversible error.

The issue here is similar but not the same as that in Green. Petitioner is asking to have the opportunity to withdraw his sentencing election since he was not properly advised of the consequences of his election and was led to believe that he was still eligible for parole once the court departed from the presumptive guidelines sentence. In analogous situations, where a plea agreement is not honored because of a factual misunderstanding, mistake, or the trial court's inability to comply with a precondition to the entry of the plea, the defendant is entitled to withdraw his plea. See Ritchie v. State, 458 So.2d 877 (Fla. 2d DCA 1984); Stranigan v. State, 457 So.2d 546 (Fla. 2d DCA 1984). Where a plea is based upon a failure of communication or a misunderstanding of facts which were material in the decision to enter the plea, the court must permit the defendant to withdraw his plea. Ritchie v. State, supra. Likewise, where an election is based on the misunderstanding that the defendant is waiving his right to parole only if the trial court imposes a sentence within the guidelines range, but that a departure constitutes a non-guidelines sentence for which the defendant is still eligible for parole, the defendant should be afforded the opportunity to withdraw his election. It is wholly inconsistent to reverse a lengthy sentence "which the trial court may not have imposed had it known the defendant would not be eligible for parole" (A 2),

yet affirm an unknowing, but affirmative, election, when the defendant labored under the same material misunderstanding as to the effect of a departure.

Since it is uncertain whether petitioner understood that he was waiving any right to parole once he elected to be sentenced under the guidelines, or whether he understood that he was waiving his right to parole only if the trial court imposed a sentence within the recommended range, the purported waiver, exposing him to a retroactive application of the law, violated due process and was void. The remedy for the ex post facto violation in this case is a new sentencing hearing with petitioner being given the opportunity to make a knowing and intelligent election whether to waive the right to parole consideration in exchange for a sentence imposed under the guidelines. Petitioner does not contend he would necessarily have to be given a sentence which the guidelines score indicates; he is entitled, however, to be fully informed of the consequences of his election, the most significant of which is waiver of parole eligibility.

V CONCLUSION

Based upon the foregoing argument, reasoning and citation of authority, petitioner submits this Court should answer the certified question in the affirmative and hold that an election to be sentenced under the guidelines must be knowingly and intelligently made. Because the election here was merely affirmative, and the record does not show that petitioner knowingly and intelligently waived his right to parole, but rather shows that both petitioner and the sentencing judge believed petitioner would be eligible for parole once the trial court departed from the guidelines, petitioner should be given the opportunity to withdraw his election or to make a knowing and intelligent choice whether to waive the right to parole consideration.

Respectfully submitted,

MICHAEL E. ALLEN
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

Paula S. Saunders

PAULA S. SAUNDERS
Assistant Public Defender
Post Office Box 671
Tallahassee, Florida 32302
(904) 488-2458

Attorney for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above Petitioner's Brief on the Merits has been furnished by hand to Assistant Attorney General John Koenig, Jr., The Capitol, Tallahassee, Florida 32301; and by U.S. Mail to Appellant, Leroy Steven Bradley, #019580, Post Office Box 221, Raiford, Florida 32083 on this 16th day of July, 1985.

Paula S. Saunders
PAULA S. SAUNDERS