IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

PETITIONER,

-VS-

JOHNNIE B. STUBBS,

RESPONDENT.

FSC CASE NO. 67,313

1st DCA CASE NO. AZ-388

FILED
SID J. WHITE
JUL 12 1985
CLERK, SUPREME COURT
By _____
Chief Deputy Clerk

PETITIONER'S JURISDICTIONAL BRIEF

JIM SMITH
ATTORNEY GENERAL

ANDREA SMITH HILLYER
ASSISTANT ATTORNEY GENERAL
THE CAPITOL
TALLAHASSEE, FL 32301
(904) 488-0600

COUNSEL FOR PETITIONER

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PRELIMINARY STATEMENT

Petitioner is the State of Florida. Respondent is the appellant/defendant below. References to the record are by use of the letter "R"; references to the transcript are by use of the letter "T".

STATEMENT OF THE CASE AND FACTS

Respondent was charged by information with felony possession of cannabis and two other crimes which were later nolle prossed (R 12). On September 10, 1979, respondent was placed on probation for five years on condition that he serve two years in the Lake City Community Correctional Center, and pay a $1,000 fine (R 3-4). On August 8, 1980, the prison condition was deleted (R 5-6).

On December 20, 1982, an affidavit of violation of probation was filed (R 7-8); this was amended on January 19, 1983 (R 11-12), and March 21, 1983 (R 14-15). At a hearing held April 18, 1984, the State introduced without objection a judgment and sentence showing respondent had been convicted after trial of possession of cocaine (T 1-7). The court found respondent had violated his probation and revoked same (T 12, R 19). Respondent's counsel noted that the sentencing guidelines scoresheet called for any non-state prison sanction (R 25). The court noted that the guidelines sentence could be enhanced to the next higher cell for a probation revocation, which called for a maximum sentence of 30 months in prison. Respondent's counsel agreed with the court, and respondent agreed to elect the guidelines and accept the 30 month sentence (T 13-15). The court imposed that sentence, with credit for 410 days served, to run consecutively to the 3 year sentence on the cocaine conviction (R 21-24, T 16).

ISSUE

THE OPINION OF THE FIRST DISTRICT EXPRESSLY AND DIRECTLY CONFLICTS WITH THE OPINION IN BRADLEY V. STATE, 10 F.L.W. 1544 (Fla.2d DCA June 21, 1985) REGARDING THE NECESSITY OF A CONTEMPORANEOUS OBJECTION: AND EXPRESSLY AND DIRECTLY CONFLICTS WITH THIS COURT'S OPINION IN LEE V. STATE, 294 So.2d 305 (Fla.1974),AS REGARDS THE NON-RETROACTIVE APPLICATION OF FLA.R.CRIM.P. 3.701(d)(14).

ARGUMENT

For purposes of clarity, this jurisdictional brief is divided into two subsections: 1) contemporaneous objection, and 2) retroactive application.

1. Contemporaneous Objection

In the opinion below, the First District wrote:

> The fact that, at the time of the sentencing, all parties believed the amendment was in effect does not preclude an appeal from the sentence. The appellant is entitled to be sentenced under the guidelines in effect on April 13, 1984. Saunders, supra. A defendant does not waive on appeal from a sentence imposed outside the guidelines by his failure to make a contemporaneous objection. State v. Rhoden, 448 So.2d 1013 (Fla.1984); Mitchell v. State, 458 So.2d 10 (Fla.1st DCA 1984).

(See appendix).

Respondent raised no contemporaneous objection to the trial court's failure to use the amended rule. Use of the amended rule would not have changed anything; under the rules in effect at the time of respondent's sentencing on April 18,

1984, the trial judge was required to state in writing the reason for departure. Under the amended rules, the trial judge does not have to give written reasons where he departs on the basis of a violation of probation and elevates the recommended sentence up to the next higher cell. At respondent's sentencing it was evident to all persons present that the trial judge enhanced respondent's sentence due to the violation of probation. As such, the transcripts suffice to show compliance with the writing requirement. See §1.01(4), Fla.Stat. (1983) and the following cases presently before this court: State v. Oden, Case No. 66,650; State v. Jackson, Case No. 65,857; State v. Hernandez, Case No. 66,875; State v. Boynton, Case No. and State v. Schmidt, Case No. 67,122.

The First District's refusal to require a contemporaneous objection in this case is in conflict with Dailey v. State, 10 F.L.W. 1583 (Fla.1st DCA June 27, 1985), and Bradley v. State, 10 F.L.W. 1544 (Fla.2d DCA June 21, 1985). In Dailey v. State, supra, the appellant raised no contemporaneous objection to the trial court's alleged error in scoring. In its later, substituted opinion the First District noted that the facts were distinguishable from those in State v. Rhoden, 448 So.2d 1013 (Fla.1984); Walker v. State, 462 So.2d 452 (Fla.1985) and State v. Snow, 462 So.2d 455 (Fla.1985) in that in those three cases the errors were apparent and determinable from the record before the appellate court because all three cases involved the mandatory duty of the trial court to make affirmative findings on the record, which were not made. In Dailey the appellate court stated:

> It is incumbent upon defense counsel to raise, at the trial level, any objections to underlying factual matters supporting the factors on the scoresheet. Here, counsel did not object to either of the issues now asserted, there is no ruling by the trial court, and there is no record supporting either the pro or con of appellant's contentions on appeal.

10 F.L.W. 1583.

In Whitfield v. State, 10 F.L.W. 1564 (Fla.1st DCA June 25, 1985) the First District certified the question of whether State v. Rhoden, supra, is to be limited to situations involving statutory mandatory duties placed on trial courts, or whether Rhoden should be construed to mean that defendant need not contemporaneously object to any alleged sentencing error in order to preserve that issue for appeal. Finally, in Bradley v. State, supra, the Second District held that since the defendant failed to contemporaneously object below, his contention on appeal as to inaccuracies in scoring would not be heard on appeal and thus his sentence was affirmed. In the instant case, the respondent's failure to object to the trial court's departure precluded review on appeal. Additionally, respondent's failure to object to the alleged ex post facto application of the amended rule did not preserve the issue for review. Fredericks v. State, 440 So.2d 433 (Fla.1st DCA 1983).

2. Retroactive Application

The First District held in its opinion that Rule 3.701(d)(14) cannot be retroactively applied, citing to Jackson v. State,

454 So.2d 691 (Fla.1st DCA 1984); Randolph v. State, 458 So.2d 64 (Fla.1st DCA 1984); Saunders v. State, 459 So.2d 1119 (Fla. 1st DCA 1984) and Oldfield v. State, 10 F.L.W. 1123 (Fla.1st DCA May 7, 1985). This conflicts with prior reasoning used by this Court in Lee v. State, 294 So.2d 305 (Fla.1974). The amended version of Rule 3.701(d)(14) did not increase any penalty which could have been imposed at the time of the commission of the offense. The amended Rule 3.701(d)(14) simply obviated the need for the trial judge to put forth in writing his reason for departure when such departure is based upon violation of probation. The amount of the penalty did not change; and, under the traditional discretion of the sentencing judge, previously the sentence had only to be within the confines of statutory law. It is not an ex post facto application to apply Rule 3.701(d)(14) retroactively because it does not expose respondent to a greater penalty than that which could originally have been imposed at the time of the commission of the offense. Lee v. State, supra. As stated by this Court in Lee;

> If the subsequent statute merely re-enacted the previous penalty provisions without increasing any penalty provision which could have been imposed under the statute in effect at the time of the commission of the offense, then there could be no application of a subsequent penalty provision which would do violence to the concept of an ex post facto law.

294 So.2d at 30).

Petitioner urges this Court to accept jurisdiction in this case and clarify these two very important areas of the law.

Respectfully submitted,

JIM SMITH
Attorney General

Andrea Smith Hillyer

ANDREA SMITH HILLYER
Assistant Attorney General
The Capitol
Tallahassee, FL 32301
(904) 488-0600

COUNSEL FOR PETITIONER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Jurisdictional Brief has been forwarded to Mr. P. Douglas Brinkmeyer, Assistant Public Defender, Post Office Box 671, Tallahassee, FL 32302, via U. S.Mail, this 12th day of July 1985.

Andrea Smith Hillyer
Andrea Smith Hillyer
Assistant Attorney General