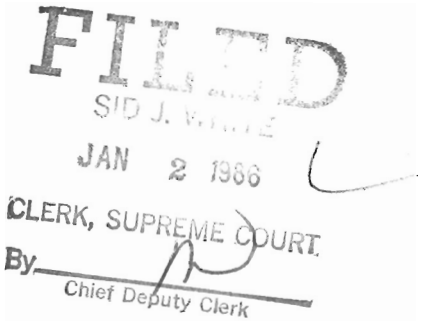
IN THE SUPREME COURT OF FLORIDA



STATE OF FLORIDA,

PETITIONER,

-VS-

CASE NO. 67,313

JOHNNIE B. STUBBS,

RESPONDENT.

PETITIONER'S BRIEF ON THE MERITS

JIM SMITH
ATTORNEY GENERAL

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

COUNSEL FOR PETITIONER

TOPICAL INDEX

TABLE OF CITATIONS

TABLE OF CITATIONS (Cont'd)

OTHER

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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 34). 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 nonstate 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).

On appeal in the First District Court of Appeal, respondent raised the issue of retroactive application of the amendment to the guidelines. The First District held that Rule 3.701(d)(14), as amended effective July 1, 1984, could not be retroactively applied. Additionally, the court ruled that respondent did not waive an appeal from his sentence imposed outside the guidelines by his failure to make a contemporaneous objection.

Petitioner invoked the discretionary jurisdiction of this Court on the basis of conflict; petitioner and respondent filed their jurisdictional briefs. On December 12, 1985, this Court accepted jurisdiction and dispensed with oral argument.

SUMMARY OF ARGUMENT

Since respondent raised no contemporaneous objection to the trial court's use of the amended rule or to the trial court's departure from the guidelines sentence, respondent was precluded from raising such issue(s) on appeal. Neither of those issues involve situations like those in **State v. Rhoden,** 448 So.2d 1013 (Fla.1984); **Walker v. State,** 402 So.2d 452 (Fla.1985) and **State v. Snow,** 462 So.2d 455 (Fla.1985) where the errors were apparent and determinable from the record because they involved the mandatory duty of the trial court to make affirmative findings on the record which were not made. It was incumbent upon defense counsel to raise at the trial level any objections to underlying factual matters supporting the factors on the scoresheet. The question of whether **State v. Rhoden** should be limited to situations where the trial judge fails to make statutorily mandated sentencing findings is presently before this Court in **Dailey v. State,** FSC #67,381, and **State v. Whitfield,** Case #67,320.

Rule 3.701(d)(14) can be retroactively applied because the amendment merely effected a procedural change, not requiring the application of the ex post facto doctrine. The amendment did not increase any penalty which could have been imposed at the time of the commission of the offense; it simply obviated the need for the trial judge to put forth in writing his reason for departure when such departure is based upon a violation of probation.

The appellate court's opinion is incorrect.

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 1985) REGARDING THE NECESSITY OF A CONTEMPORANEOUS OBJECTION: AND EXPRESSLY AND DIRECTLY CONFLICTS WITH THIS COURT'S OPINION IN STATE V. JACKSON, NO. 65,857 (OCTOBER 17, 1985) AND LEE V. STATE, 294 So.2d 305 (Fla.1974) AS REGARDS THE NON-RETROACTIVE APPLICATION OF FLA.R.CRIM.P. 3.702(d)(14).

ARGUMENT

The argument section is divided into two subsections: 1) contemporaneous objection, and 2) retroactive application.

1. Contemporaneous Objection

As noted by the District Court, respondent raised no contemporaneous objection to the trial court's use of the amended rule. At the time of respondent's sentencing on April 18, 1984, the rule in effect required the trial judge 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. Here, the trial judge did not state in writing his reason for departure because all parties thought the amended rule applied. It was evident to all persons present at the sentencing that the trial judge enhanced respondent's sentence due to the violation of probation. Respondent never objected to the trial court's use of the amended rule to enhance his sentence without the necessity of a writing.

In **Dailey v. State,** ___ So.2d ___ (Fla.1st DCA 1985), 10 F.L.W. 1583, on motion for rehearing denied, 10 F.L.W. 1584, the appellant did not contemporaneously object to the trial court's alleged scoring error. On rehearing, 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 as all three cases involved the mandatory duty of the trial court to make affirmative findings on the record, which were in fact not made. The court certified the following question to this Court, where it is presently under consideration, see **Dailey v. State,** #67,381:

> DOES THE CONTEMPORANEOUS OBJECTION RULE APPLY TO PRECLUDE APPELLATE REVIEW OF AN ALLEGED SENTENCING ERROR UNDER THE GUIDELINES WHERE THE ERROR CLAIMED INVOLVES FACTUAL MATTERS THAT ARE NOT APPARENT OR DETERMINABLE FROM THE RECORD ON APPEAL?

Likewise, in **Whitfield v. State,** ___ So.2d ___ (Fla.1st DCA 1985), 10 F.L.W. 1564, the court certified the question:

> IS THE DECISION IN STATE V. RHODEN, 448 So.2d 1013 (Fla.1984) TO BE LIMITED TO THOSE SITUATIONS IN WHICH A STATUTE PLACES A MANDATORY DUTY UPON THE TRIAL COURT TO MAKE SPECIFIC FINDINGS OR SHOULD RHODEN BE CONSTRUED TO MEAN THAT A DEFENDANT NEED NOT CONTEMPORANEOUSLY OBJECT TO ANY ALLEGED SENTENCING ERROR IN ORDER TO PRESERVE THAT ISSUE FOR APPEAL?

And, in **Bradley v. State,** ____ So.2d ____ (Fla.2d DCA 1985), 10 F.L.W. 1544, 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 present matter, not only was there a failure to object, there was agreement between all parties that the new provision applied and that appellant's sentence could be automatically enhanced for violation of probation. Except in rare cases of fundamental error, appellate counsel must be bound by the acts of trial counsel. **Castor v. State,** 365 So.2d 701, 703. See also **Ray v. State,** 403 So.2d 956 (Fla.1981), **Moore v. Wainwright,** 633 F.2d 406 (5th Cir.1980) and **McPhee v. State,** 254 So.2d 406 (Fla.1st DCA 1971).

This Court should expressly limit **State v. Rhoden,** supra, and its progeny to mean only that a defendant need not specifically and contemporaneously object to alleged sentencing errors of either fact or law to preserve such issues for appeal only where a trial judge has either failed to make specific sentencing findings as mandated by statute without affording the defendant an opportunity to object thereto, or has imposed sentences in excess of the maximums authorized by statute.

In conclusion, respondent's failure to object to the trial court's departure precluded review on appeal, as did respondent's failure to object to the alleged ex post facto application of the amended rule. **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). However, since the First District's opinion, and since the filing of the jurisdictional briefs, this Court has issued its opinion in **State v. Jackson,** No. 65,857 (October 17, 1985), in which this Court expressly dealt with the instant issue:

> The second issue in this case concerns the guidelines to be used in resentencing. Citing the Fifth District Court of Appeal decision in **Carter v. State,** 452 So.2d 953 (Fla.5th DCA 1984), for the proposition that an amendment to the guidelines cannot be applied retroactively, the district court concluded that **Jackson** was entitled to be sentenced under the guidelines in effect at the time the sentence was imposed. The state argues that the district court erred in so holding and contends that the current guidelines must be used in the resentencing process.
>
> We agree with the state that the presumptive sentence established by the guidelines does not change the statutory limits of the sentence imposed for a particular offense. We conclude that a modification in the sentencing guidelines procedure, which changes how a probation violation should be counted in determining a presumptive sentence, is merely a procedural change, not requiring the application of the ex post facto doctrine. In **Dobbert v. Florida,** 432 U.S. 282 (1977), the United States Supreme Court upheld the imposition of a death sentence under a procedure adopted after the defendant committed the crime, reasoning that the procedure by which the penalty was being implemented, not the penalty itself, was changed. We reject Jackson's contention that **Weaver v. Graham,** 450 U.S. 24 (1981), should control in these circumstances.

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 a violation of probation. This is clearly a modification in procedure, not substance. 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. This is consistent with this Court's statements in **Lee v. State,** 294 So.2d 305 (Fla.1974):

> 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.

In **Paschal v. Wainwright,** 738 F.2d 1173 (11th Cir.1984), the court ruled that the retroactive application of parole guidelines pursuant to Sec. 947.002, Fla.Stat., did not constitute an ex post facto violation. The court refused to apply **Weaver v. Graham** to a discretionary state act where the act only changed the form by which the discretion was exercised:

> Petitioner's case is unlike Weaver in that petitioner challenges guidelines promulgated by a state agency to guide its discretion, not a mandatory statute adopted by the State Legislature. The prisoner in Weaver had a mandatory statutory entitlement to receive a certain amount of automatically calculated good time credit. Since no discretion was involved in awarding that good time, the change in the formula by which it was calculated effectively lengthened the term of imprisonment for prisoners who abeyed the institutional rules. 450 U.S. at 34-36, 101 S.Ct. at 967 , 968. In contrast, the commission's parole decision, both under the parole system at the time of petitioner's conviction and under the guidelines, involvedd the use of discretion and judgment. See Fla.Stat.Ann. §947.172(3) (1983), Overfield v. Florida Parole Commission, 418 So.2d 321 (Fla.App.1982). The promulgation of guidelines under the act did not alter the consequences that flowed from petitioner's crime: both in 1968 when he committed that crime, and in 1979, when the Commission set his presumptive parole date, the Commission had complete discretion over the parole decision. Only the form by which the Commission exercised that discretion changed.

See also **May v. Florida Parole and Probation Commission,** 435 So.2d 834 (Fla.1983); **Lopez v. Florida Parole and Probation,** 410 So.2d 1354 (Fla.1st DCA 1982). Also see **Dobbert v. Florida,** 432 U.S. 282 (1977).

Petitioner's position in the instant case is further buttressed by the fact that the Sentencing Guidelines Commission, chaired by Justice McDonald, adopted the statement of intent that revisions are intended to be procedural in nature. (See Appendix 1).

In conclusion, the First District's opinion should be corrected in conformance with this Court's pronouncement in **Jackson.**

CONCLUSION

For the above reasons, the First District Court's opinion should be overturned.

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 Brief on the Merits has been forwarded to Mr. P. Douglas Brinkmeyer, Assistant Public Defender, Post Office 671, Tallahassee, FL 32302, via U. S. Mail, this 2nd day of January 1986.

Andrea Smith Hillyer
Andrea Smith Hillyer
Assistant Attorney General