

027
IN THE SUPREME COURT OF FLORIDA

BARRY ALLEN WILLIAMS,

Petitioner,

vs.

CASE NO. 67,369

STATE OF FLORIDA,

Respondent.

FILED
SID J. WHITE
FEB 29 1989
CLERK SUPREME COURT
BY _____

REPLY BRIEF OF PETITIONER

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SUMMARY OF ARGUMENT

The sentencing court sought to reserve to itself the power to deny application of the sentencing guidelines by imposing three conditions upon the application to Petitioner of the guidelines. This is not permitted by statute or rule.

There was no valid reason to exceed the guidelines and Petitioner had not agreed, as part of a plea bargain, to the imposition of a twenty year sentence. Therefore, the sentence in excess of the presumptive guideline sentence in Petitioner's case was illegal.

STATEMENT OF THE CASE AND OF THE FACTS

Petitioner incorporates by reference herein the Statement Of The Case and Of The Facts included in Petitioner's Brief On The Merits.

I.

THE COURT BELOW ERRED IN SENTENCING PETITIONER OUTSIDE THE PRESUMPTIVE GUIDELINE SENTENCE WHERE THE ONLY REASON FOR DEPARTING FROM THE GUIDELINE SENTENCE WAS PETITIONER'S FAILURE TO APPEAR FOR A PRIOR SCHEDULED SENTENCING.

Petitioner maintains his contention that the court below erred in sentencing him in excess of the presumptive guideline sentence based solely upon on his failure to appear for a prior scheduled sentencing.

Respondent attempts to distinguish Harms v. State 454 So. 2d 689 (Fla. 1st D.C.A. 1984) by saying that Harms's failure to appear was not wilfull. Footnote four to the opinion in Harms makes it crystal clear that Harms' failure to appear was wilfull, he was engaged in a violent crime spree at the time he should have appeared in court.

Next, Respondent addresses the key question, can a court condition application of the sentencing guidelines on compliance with conditions laid down by the court? Respondent cites Geter v. State 473 So. 2d 31 (Fla. 1st D.C.A. 1985), Johnson v. State 458 So. 2d 850 (Fla. 2nd D.C.A. 1984), and Bell v. State 453 So. 2d 478 (FLa. 2d D.C.A. 1984) in support of his contention that a court may do so.

In Geter there was an agreed upon three years cap on incarceration, it was held that this permitted exceeding the thirty month guideline sentence because Geter specifically agreed to the cap on the incarceration, it was, " an agreement ... up to that amount." Geter, supra at 32. Johnson stands for the simple proposition that a departure from the sentencing guidelines is warranted when a plea bargain specifies the

permissible sentence, as does Bell.

In the case at bar Judge Pack repeatedly told the Petitioner he would be sentenced under the guidelines. (R. 10, 11, 19 & 20). It was only at the end of the whole change of plea hearing that Judge Pack informed Petitioner that his application of the guidelines was conditioned on three factors. (R. 21-22) Petitioner was told,

"If any one of those conditions is not met, I will not be bound by my promise and I'll not allow you to withdraw your plea and I will not be bound by my promise to sentence under the guidelines; do you understand?"

To which Petitioner replied he understood and Judge Pack continued;

"But, I will be able to sentence you as I see fit, up to twenty years." (R. 22)

This being the statutory maximum for the crimes to which Petitioner entered his guilty plea.

Clearly, the twenty years in state prison was not a bargained for cap as in Geter and Bell. Rather it is more like the fifteen year maximum statutory sentence described in Coates v. State 458 So. 2d 1219 (Fla. 1st D.C.A. 1984). There the First District held that a sentence in excess of the guideline must be reversed where the sentencing court stated:

"Do you realize that by entering your plea to this charge, which is a second degree felony, would expose you to 15 years in the state penal system ...? Coates, at 1220.

The First District found that this colloquy did not indicate that the plea bargain specified Coates' permissible sentence but, only that Coates knew that by entering the plea he was exposing himself to 15 years imprisonment. It was held not to be an agreement on his part to a permissible sentence. Coates, supra at 1221. The case at bar is clearly much closer factually to Coates than to Geter or Bell with

their pleas to specific caps on incarceration.

The sentencing court must apply the guidelines to all non-capital felonies occurring after October 1, 1983. There is no statutory scheme allowing the trial court to set up its own preconditions to application of the guideline. F.S. 921.001(4)(a). Neither is there such discretion in the Rules. 1983 Committee Note (b), Fla. R. Crim. P. 3.701.

Judge Pack clearly sought to preserve to himself the power to exceed the presumptive guideline sentence by conditioning the application of the sentencing guidelines themselves upon Petitioner's compliance with a set of conditions not found in the relevant statutes or Rules of Criminal Procedure, this he cannot do.

There can be no contention that Petitioner agreed to this as part of a plea bargain. Petitioner received nothing from the court that the court was not mandated by law to do anyway, apply the sentencing guidelines. Therefore, the presumptive sentence was required to be applied unless legal reason for exceeding the guidelines existed.

A sentencing court may not exceed the guideline sentence based upon factors relating to the instant offense for which convictions have not been obtained. Monti v. State 11 F.L.W. 61 (Fla. 5th D.C.A. 1985). Monti, is a failure to appear case. The State's remedy in these cases is criminal contempt or a prosecution for violation of Section 843.15 Florida Statutes, it is impermissible to deviate from the guidelines based upon a crime for which the defendant has not been convicted. Monti, supra.

CONCLUSION

This Court must vacate the sentence previously imposed and remand for imposition of a sentence under the guidelines.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Reply Brief of Petitioner has been furnished by regular U.S. Mail to the Attorney General's Office, Park Trammel Building, Suite 804, 1313 Tampa Street, Tampa, Florida 33602



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