

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,)
)
 Petitioner)
)
 vs.)
)
 DONALD EUGENE HURST,)
)
 Respondent.)
 _____)

CASE NO 67,453

FILED
SID J. WHITE
AUG 27 1969
CLERK, SUPREME COURT
By *[Signature]*
Chief Deputy Clerk

RESPONDENT'S BRIEF ON JURISDICTION

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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STATEMENT OF THE CASE AND FACTS

Respondent hereby accepts the Statement of the Case and Facts as presented by the Petitioner in its jurisdictional brief.

SUMMARY OF THE ARGUMENT

The appellate court's construction of provisions of the State and Federal Constitution in this case does not call for an exercise of this Court's discretionary jurisdiction. There is no conflict between the case at bar and other decisions of this Court, and no jurisdiction can be based on that ground.

QUESTION PRESENTED

WHETHER THIS COURT SHOULD EXERCISE ITS DISCRETIONARY JURISDICTION TO REVIEW THE DECISION OF THE DISTRICT COURT OF APPEAL WHICH EXPRESSLY CONSTRUES A PROVISION OF THE UNITED STATES CONSTITUTION AND THE FLORIDA CONSTITUTION, AND ADDITIONALLY, CREATES DIRECT AND EXPRESS CONFLICT WITH A DECISION OF THE SUPREME COURT OF FLORIDA.

ARGUMENT

It is true, as the Petitioner states, that the Fifth District Court of Appeal, did rely in part on the United States and Florida Constitutions in reaching its decision in this case. The Court of Appeal's reasoning in construing the constitutional provisions is sound, and this Court should not exercise its discretionary jurisdiction to review the District Court of Appeal's opinion. The other Courts of Appeal which have addressed the issue of retroactive application of the guidelines have been in agreement with the Fifth District Court of Appeal. See Beggs v. State, 10 FLW 1729 (Fla. 1st DCA July 16, 1985); Sueriro v. State, 10 FLW 1525 (Fla. 3d DCA June 18, 1985); Stoute v. State, 10 FLW 1093 (Fla. 4th DCA May 1, 1985).

The Petitioner also alleges that the opinion in the case at bar is in express and direct conflict with Mills v. State, 462 So.2d 1075,1080 (Fla. 1985). This Court in Mills held that an increased period of retention of jurisdiction was not an increase in the "quantum of punishment" because the defendant was subject to retention of jurisdiction at the time of his crime.

This Court held that since the quantum of punishment did not increase, there was no ex-post facto violation.

While it is true that Respondent was subject to the sentencing guidelines at the time he committed his crimes, the amendment to Committee Note to Florida Rule of Criminal Procedure 3.701 (d)(12), increased the quantum of punishment Respondent was subject to. In the case at bar the actual length of time Respondent could be sentenced to without reasons for departure was increased. The amendment made the punishment for the crime more severe after the crime was committed, thus creating an ex-post facto violation. See Vobbert v. Florida, 432 U.S. 282, 53 L.Ed.2d 344, 97 S.Ct. 2290 (1977). State v. Williams, 397 So.2d 663 (1981).

In the case at bar the lower court gave no reasons for departing from the guidelines. The court was thus limited to the guidelines maximum in sentencing Respondent. The amendment to the Committee Note removed the restriction on the sentencing court and allowed a lengthier sentence to be imposed. Unlike the Mills case (supra). This Court should not grant review of the decision of the Fifth District Court of Appeal.

CONCLUSION

BASED ON the foregoing reasons and authority,
Respondent respectfully asks this Honorable Court not to exercise
its discretionary jurisdiction in reviewing the opinion of the
Fifth District Court of Appeal in this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that a true and correct copy of the
foregoing has been served upon the Honorable Jim Smith, Attorney
General, 125 N. Ridgewood Avenue, Second Floor, Daytona Beach,
Florida 32014; and mailed to Donald Eugene Hurst, Inmate No.
919175, Hendry Correctional Institute, Route 1, Box 13A,
Immokalee, Florida 33934-9747, on this 26th day of August, 1985.

Kenneth Witts

KENNETH WITTS
ASSISTANT PUBLIC DEFENDER