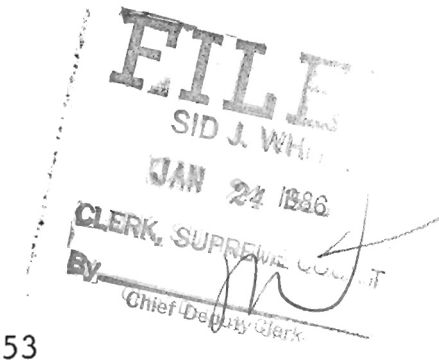
IN THE SUPREME COURT OF FLORIDA



STATE OF FLORIDA,

Petitioner,

v.

DONALD EUGENE HURST,

Respondent.

CASE NO. 67,453

PETITIONER'S BRIEF ON THE MERITS

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AUTHORITIES CITED

OTHER AUTHORITIES

STATEMENT OF THE CASE AND FACTS

On October 24, 1984, respondent pled guilty and was sentenced for the offense of burglary to a dwelling and grand theft in case number 84-1067. The latter offenses occurred on February 22, 1984 (R 43). In case number 84-4044, respondent also pled guilty and was sentenced for the offense of burglary to a dwelling on October 24, 1984 (R 3). That offense occurred on February 13, 1984 (R 28).

On October 24, 1984, the trial court imposed a guideline sentence as follows:

Case number 84-1067;

COUNT I: (Burglary of a Dwelling) - 3 & 1/2 years imprisonment, followed by ten (10) years of probation (R 63).

COUNT II: (Grand Theft) - 3 & 1/2 years imprisonment only (R 64).

Case number 84-4044;

COUNT I: (Burglary of a Dwelling) - 3 & 1/2 years imprisonment, followed by ten (10) years of probation (R 68)

All the sentences, including the imprisonment and the probation, were concurrent to each other (R 9-10,64,69).

On appeal, the sentence was reversed in Hurst v. State, 474 So.2d 280 (Fla. 5th DCA 1985). That opinion held that the sentence was an illegal departure sentence under the original committee note to Florida Rule of Criminal Procedure 3.701(d)(12). The opinion quoted from the original committee note as follows: "If a split sentence is imposed . . . the incarcerative portion imposed shall not be less than the minimum of the guideline range,

and the total sanction imposed cannot exceed the maximum guideline range." Id. at 281-282. The opinion did acknowledge that this committee note had been amended and was effective prior to the sentencing in the case at bar. The court quoted the pertinent part of the amendment as follows: ". . . the total sanction (incarceration and probation) shall not exceed the term provided by law." (emphasis supplied). Id. at 281. The district court went on to explain that the sentences were not proper under the original committee note because the crimes occurred in February of 1984. The ultimate holding declared the sentence which was imposed based upon the amended committee note, was a harsher punishment than mandated by the original committee note. Thus the sentence could not be applied retroactively because it violated the ex post facto doctrine.

Petitioner filed a motion for rehearing which was denied. Petitioner then sought the discretionary jurisdiction of this court, which accepted jurisdiction on January 10, 1985. Petitioner's brief on the merits follows.

SUMMARY OF ARGUMENT

The opinion on review, Hurst v. State, 474 So.2d 280 (Fla. 5th DCA 1985), cannot be reconciled with this court's holding in State v. Jackson, 10 F.L.W. 564 (Fla. October 17, 1985). Under State v. Jackson, the amended committee note, allowing a sentence to be imposed based upon a split-sentence which does not exceed the general term of law (as opposed to one that cannot exceed the maximum guideline range), is merely a procedural change. Thus, the critical date is the sentencing date; not the date of the crime. Hence, the trial court's original sentence was proper.

POINT I

THE AMENDMENT OF THE COMMITTEE NOTE UNDER FLORIDA RULE OF CRIMINAL PROCEDURE 3.701(d)(12), DOES NOT CONSTITUTE A MORE SEVERE PUNISHMENT: THEREFORE THE SENTENCE IMPOSED IN THE CASE AT BAR WAS LAWFUL.

ARGUMENT

Petitioner submits that this court's decision in State v. Jackson, 10 F.L.W. 564 (Fla. October 17, 1985), mandates that the opinion in Hurst v. State, 474 So.2d 280 (Fla. 5th DCA 1985), be quashed and the original sentence imposed, be reinstated. In State v. Jackson, it was held that a change in how a guideline score is computed is merely procedural; not substantive. Therefore, the doctrine of ex post facto did not apply. This court rejected the analogy between the guidelines and Weaver v. Graham, 450 U.S. 24, 101 S.Ct. 690, 67 L.Ed.2d 17 (1981), and adopted the logic of Dobbert v. Florida, 432 U.S. 282, 97 S.Ct. 2290, 53 L.Ed.2d 344 (1977). The cause was remanded to have the trial court impose a sentence based upon the guidelines in effect at the time of the sentence; not at the time of the offense.[1]

The Fifth District Court of Appeal in O'Brien v. State, 10 F.L.W. 2544 (Fla. 5th DCA November 14, 1985), has already adopted the holding of State v. Jackson, supra, and applied it to the identical issue and facts in the case at bar, i.e., the

[1] In State v. Jackson, supra, the trial court utilized Florida Rule of Criminal Procedure 3.701(d)(14), although that rule was not in effect at the time of the crime but was in effect at the time of sentencing. Jackson v. State, 454 So.2d 691 (Fla. 1st DCA 1984).

revision of the committee note to rule 3.701(d)(12). Petitioner would note that the second district court of appeal in Davis v. State, 10 F.L.W. 1972 (Fla. 2d DCA August 16, 1985), on rehearing held that State v. Jackson, supra, overruled their prior decision in that the amended guidelines, if applicable during the sentencing date (although not in effect at the time of the crime) were the proper guidelines to be utilized. On Rehearing, 10 F.L.W. 2747 (Fla. 2d DCA December 11, 1985). See also, Inscore v. State, 11 F.L.W. 73 (Fla. 4th DCA December 26, 1985), which acknowledged that the holding of State v. Jackson, supra, mandated that the date of sentencing (not the time of the crime) was the critical date and that the ex post facto doctrine played no consideration in sentencing issues of this nature. Cf., Wilkerson v. State, 10 F.L.W. 45 (Fla. 1st DCA December 23, 1985), which upheld a sentence based upon a guideline amendment to Florida Rule of Criminal Procedure 3.701(d)(5)(c), which was applicable at the time of sentencing but not at the time of the crime and where the holding was predicated upon State v. Jackson, supra, but the question was certified.

CONCLUSION

Based upon the arguments and authorities presented herein, petitioner respectfully prays this honorable court reverse the decision of the Fifth District Court of Appeal of the State of Florida.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing Petitioner's Brief on the Merits , has been furnished, by mail, to Kenneth Witts, Assistant Public Defender, for respondent, at 112 Orange Avenue, Daytona Beach, Florida, 32014, this 22nd day of January, 1986.

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