

IN THE SUPREME COURT OF FLORIDA,

CASE NO. 67,468

THE STATE OF FLORIDA,

Petitioner,

vs.

JORGE SUEIRO,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW

BRIEF OF PETITIONER ON JURISDICTION

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FILED

SID J. WHITE

AUG 16 1985

CLERK, SUPREME COURT

By 
Chief Deputy Clerk



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STATEMENT OF CASE AND FACTS

On March 7, 1984, Jorge Sueiro, the defendant in the trial court, was charged, by information, with burglary and theft committed on February 14, 1984. After a jury trial the defendant was adjudged guilty of burglary of a dwelling and petty theft, and was sentenced on May 1, 1984.

At the May 1, 1984 sentencing hearing, the trial judge applied the amendment to the sentencing guidelines scoresheets, which permitted additional points to be added for prior offenses in excess of four, in any applicable category. That amendment did not become effective until July 1, 1984.

In a decision dated June 18, 1985, the Third District Court of Appeal affirmed the conviction, but reversed the sentence, stating:

"It is contended that the trial judge erred in basing the sentence on guidelines which were not legally in effect at the time the offense was committed on February 14, 1984. We agree. It is conceded that the guidelines used by the court were not in effect at the time the offense was committed and did not become law until July 1, 1984, almost five months thereafter. Chapter 84-328, Laws of Florida. We therefore find error in the sentencing "

The State's motion for rehearing was denied on July 23, 1985,

and a Notice to Invoke Discretionary Jurisdiction was filed
by the State.

QUESTION PRESENTED

I

WHETHER THE DECISION OF THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT, IS IN CONFLICT WITH THE PRIOR DECISIONS OF DOBBERT v. STATE, 328 So.2d 433 (Fla. 1976), STATE v. STRASSER, 445 So.2d 322 (Fla. 1983), BOSTON v. STATE, 411 So.2d 1345 (Fla. 1st DCA 1982), and BURNEY v. STATE, 402 So.2d 38 (Fla. 2d DCA 1982).

SUMMARY OF ARGUMENT

As the applicable amendment to the sentencing guidelines was procedural, rather than substantive, even though it was not in effect at the time of the offense or of sentencing, it can be applied at any subsequent re-sentencing, and it is therefore unnecessary to remand for re-sentencing, as the same result will be effected. DOBBERT v. STATE, 328 So.2d 433 (Fla. 1976), affirmed a sentence under a death penalty statute which was not in effect at the time of the offense. Several other cases have noted that changes in standard jury instructions would control at re-trials, and that prior errors in giving, or refusing to give, instruction at original trials, need not result in reversal due to the post-trial change in the standard instructions.

ARGUMENT

THE DECISION OF THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT, IS IN CONFLICT WITH THE PRIOR DECISIONS OF Dobbert v. State, 328 So.2d 433 (Fla. 1976), State v. Strasser, 445 SO.2d 322 (Fla. 1983), Boston v. State, 411 So.2d 1345 (Fla. 1st. DCA 1982), and Burney v. State, 402 So.2d 38 (Fla. 2d DCA 1982).

It is the position of the State that the applicable amendment to the sentencing guidelines was procedural, not substantive, in nature, and that even though the amendment was not in effect at the time of either the offense or sentencing, it would be in effect at the time of resentencing, and as the procedural amendment will control at the time of resentencing, there was no reason to remand.

In Dobbert v. State, 328 So.2d 433 (Fla. 1976), the Florida death penalty statute under which Dobbert was sentenced was not in effect at the time of the offense which Dobbert committed. Nevertheless, this Court affirmed the sentence. As set forth by the supreme Court of the United States in Dobbert v. Florida, 432 U.S. 282, 97 S.Ct. 2290, 53 L.Ed.2d 344 (1977), the new death penalty statute was procedural in nature, not substantive, and thus, no ex post facto problem existed.

Similarly, in Burney v. State, 402 So.2d 38 (Fla. 2d

DCA 1981), the failure of a trial judge to give a certain jury instruction would normally constitute error, but an amendment to the standard jury instruction, effective subsequent to the trial judge's actions, concluded that the instruction not given was no longer required. Even though the amended instructions were not in effect at the time of the trial, they would control a new trial, and therefore the trial court's failure to give the requested instruction did not require reversal. Similar results were reached in Boston v. State, 411 So.2d 1345 (Fla. 1st DCA 1982), and State v. Strasser, 445 So.2d 322 (Fla. 1984).

The amendment to the guidelines did not affect the maximum sentence which could be given for the offense in question, as that is set by statute. As the guidelines only create a presumptive norm, from which a departure can be effected for legitimate reasons, the amendment was procedural in nature.

Thus, a conflict exists between the opinion of the Third District Court of Appeal and the above-cited cases, and this Court should accept jurisdiction to determine whether the amendment to the sentencing guidelines can be applied at re-sentencing, and if so, whether it is therefore unnecessary to remand for re-sentencing.

CONCLUSION

Based on the foregoing, this Court should accept jurisdiction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing BRIEF OF PETITIONER ON JURISDICTION was furnished by mail to JAMES D. KEEGAN, Esq., Gitlitz, Keegan & Dittmar, P.A., Suite 807, Biscayne Building, 19 West Flagler Street, Miami, Florida 33130 on this 14th day of August, 1985.



RICHARD L. POLIN
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RLP/dm