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IN THE SUPREME COURT OF FLORIDA

CASE NO. 67,468

FILED
SID J. WHITE
MAR 12 1990
CLERK, SUPREME COURT
By
Chief Deputy Clerk

THE STATE OF FLORIDA,

Petitioner,

vs.

JORGE SUEIRO,

Respondent.

ON THE PETITION FOR DISCRETIONARY REVIEW

PETITIONER'S REPLY BRIEF ON MERITS

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SENTENCING GUIDELINES AMENDMENTS OPERATE RETROACTIVELY

Respondent's Brief has acknowledged the applicability of State v. Jackson, ____So.2d_____ (Fla. 1985), 10 FLW 564 (Case No. 65, 857, opinion filed October 17, 1985). Respondent, however, has argued that Jackson should be reversed and that the holding of Jackson that the sentencing guidelines amendments are procedural should be rejected. Petitioner maintains that there is no reason to alter the conclusion concerning the procedural nature of the guidelines.

The purely legislative, or substantive, aspect of sentencing is limited to the fixing of minimum and maximum terms of imprisonment for particular offenses. Shellman v. State, 222 So.2d 789, 790 (Fla. 2d DCA 1969); Dorminey v. State, 314 So.2d 134, 136 (Fla. 1975); State v. Benitez, 395 So.2d 514, 518 (Fla. 1981); Lighthourne v. State, 438 So.2d 380 (Fla. 1983). What happens within those minimum and maximum statutory parameters is a matter for the judiciary. Brown v. State, 152 Fla. 853, 13 So.2d 458, 461 (1943); Holmes v. State, 342 So.2d 134, 135 (Fla. 1st DCA 1977); Bunting v. State, 361 So.2d 810, 811 (Fla. 4th DCA 1978). Neither the original sentencing guidelines nor the amendments

thereto fix minimum and maximum terms of imprisonment for particular offenses; they deal with what happens within the minimum and maximum terms already established by statute. The legislature has expressly acknowledged this in the preamble to Ch. 82-145, Laws of Florida:

> WHEREAS, the Legislature, under the provisions of the State Constitution, has been delegated the authority for determining the sentence to be given for the various categories of crimes committed in Florida, and
>
> WHEREAS, The Legislature has accepted this responsibility and exercised this authority by enacting a criminal code, prescribing penalty ranges for each separate class of crimes, and
>
> WHEREAS, under the provisions of the State Constitution the judiciary has been delegated the authority for determining on a case by case basis each individual's sentence length within the ranges established by the Legislature....

This dichotomy is again noted in section 921.001(5), Florida Statutes (1983), which directs that:

> Sentences imposed by trial court judges must be in all cases within any relevant minimum or maximum sentences provided by Statute....

As the guidelines concern what happens within the statutorily fixed maximums and minimums, rather than the actual setting of the maximums and minimums, the guidelines should be viewed as a procedural implementation of the legislative sentences. This is confirmed in Rule 3.701(d)(8), Florida Rules of Criminal Procerure, which refers to the guidelines ranges as "presumptive sentences provided in the guidelines grids...."

Substantive law has been defined, in State v. Garcia, 229 So.2d 236, 238 (Fla. 1969), as "that which declares what acts are crimes and proscribes the punishment therefore...." That is fully accomplished by the legislative statute describing the maximum penalty. A guidelines amendment which provides for the addition of points for prior convictions in excess of four (as opposed to capping the calculation with the fourth prior conviction), does not proscribe the punishment for the offense and is therefore not substantive.

Respondent's Brief has further argued that even if Jackson is applicable, the amendment in the instant case differs from the amendment in Jackson. (Respondent's Brief, pp. 13-14). Respondent argues that prior to the Jackson amendment (pertaining to a one-cell increase for probation violation), the fact of probation could be used as a written reason for

departing from the guidelines. Thus, Respondent concludes, that amendment did not really have the effect of changing the ultimate sentence, as the same sentence could be imposed both prior and subsequent the amendment.

Respondent's attempt to distinguish the two amendments must fail, for Respondent's conclusions are equally applicable to the instant case. In Russell v. State, 458 So.2d 422 (Fla. 2d DCA 1984), based on the pre-amendment guidelines, the court stated that prior convictions in excess of the fouth could be considered as reasons for departing from the guidelines. Thus, pursuant to Respondent's own analysis, in this case, as well as in Jackson, the same ultimate sentence could be reached both pre- and post-amendment. As the same sentence could thus be reached in any event, the amendment cannot be deemed to have an adverse impact on the accused, and most therefore be deemed procedural. Contra, Young v. State, 455 So.2d 551 (Fla. 1st DCA 1984).

The important point is that the guidelines provide "presumptive senteces" and do not usurp judicial discretion. Rule 3.701 (b)(6), Florida Rules of Criminal Procedure. They do not set maximum penalties for offenses.

CONCLUSION

Based on the foregoing, the portion of the District Court of Appeal's decision pertaining to the sentence should be quashed and it should be concluded that either the current guidelines should apply on resentencing or that the original sentence is deemed proper.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **PETITIONER'S REPLY BRIEF ON MERITS**, was furnished by mail to **James D. Keegan, Esq., Gitlitz, Keegan and Dittmar, P.A.,** Suite 807, Biscayne Building, 19 West Flagler Street, MIami, Florida 33130, on this 10th day of March, 1986.

Richard L. Polin

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RLP/gp