

W O O A

IN THE SUPREME COURT OF FLORIDA

FILED
SID J. WHITE
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Chief Deputy Clerk

STATE OF FLORIDA,)
)
Petitioner,)
)
vs.)
)
BEN ARNETT,)
)
Respondent.)
_____)

CASE NO. 67,478

PETITIONER'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

The Petitioner, the State of Florida, was the Prosecution in the trial court and the Appellee in the District Court of Appeal, Fourth District. The Respondent was the Defendant and the Appellant, respectively, in the lower courts.

In the brief the parties will be referred to as they appeared in the trial court, State and Defendant. The symbol "r" will designate the record and "SR" the supplemental record.

STATEMENT OF THE CASE AND FACTS

On February 7, 1984, Respondent was placed on twelve (12) months probation with special condition that he serve thirty (30) days in jail, on a plea of guilty to delivery of cannabis for consideration (R 3,31). An affidavit of probation violation was filed May 15, 1984, alleging Respondent's failure to submit three (3) monthly reports, accurately report his address, and pay supervision costs (R 33). At a hearing on August 9, 1984, the Court found Respondent in violation of his probation with respect to the first two charges (R 16,36). The Court sentenced Respondent to a term of twenty four (24) months, which was within the guidelines range as amended July 1, 1984 (R 27, 35).

On appeal, the Fourth District held that even though the Respondent was sentenced after the amended guidelines, July 1, 1984, effective date, the trial court should have sentenced the Respondent pursuant to the guidelines which were in effect on the date the crimes were committed and Respondent placed on probation. Arnett v. State, 471 So.2d 547 (Fla. 4th DCA 1985).

The State, Petitioner herein, filed an application seeking discretionary review, and this Court accepted jurisdiction of the case by an order entered January 10, 1986.

POINT INVOLVED

WHETHER THE RESPONDENT, WHO COMMITTED THE OFFENSE AND WAS PLACED ON PROBATION PRIOR TO JULY 1, 1984, BUT SENTENCED ON HIS VIOLATION OF PROBATION AFTER THAT DATE, WAS PROPERLY SENTENCED UNDER THE AMENDED GUIDELINES AND THIS WAS NOT IN CONTRAVENTION OF EX POST FACTO PRINCIPLES?

SUMMARY OF THE ARGUMENT

This Court's decision in State v. Jackson, ___ So.2d ___, 10 FLW 564 (Fla. op. filed October 17, 1985) is dispositive of the instant case. Application of the amended sentencing guidelines to all sentencings after July 1, 1984, does not violate ex post facto principles because the amendments were merely procedural. Thus, the trial court's sentence was correct and the Court of Appeal erred in reversing it.

ARGUMENT

THE RESPONDENT, WHO COMMITTED
THE OFFENSE AND WAS PLACED ON
PROBATION PRIOR TO JULY 1, 1984,
BUT SENTENCED ON HIS VIOLATION
OF PROBATION AFTER THAT DATE,
WAS PROPERLY SENTENCED UNDER
THE AMENDED GUIDELINES AND THIS
WAS NOT IN CONTRAVENTION OF EX
POST FACTO PRINCIPLES.

The issue in the instant case essentially is, what guidelines apply in sentencing a defendant upon his violation of probation - the guidelines in effect at the time of the offense and placement on probation or, the guidelines in effect at the time of sentencing on the violation of probation? In his appeal to the Fourth District, the Respondent argued that application of the amended guidelines, effective July 1, 1984, to his sentence on his violation of probation which was imposed August 9, 1984, was a prohibited ex post facto application. It is clear from the appellate court's citation to Weaver v. Graham, 450 U.S. 24 (1981) in its opinion, and its discussion of "retroactive application" and "disadvantage" to a defendant the court agreed with the Respondents' argument.

Supsequent to the Fourth Districts' opinion below however, this Court rendered its decision in State v. Jackson, ___ So.2d ___, 10 F.L.W.S.C.O. 564 (Fla. October 17, 1985).

In Jackson, this Court stated:

The second issue in this case concerns
the guidelines to be used in resentencing.
Citing the Fifth District Court of Appeal
decision in Carter v. State, 452 So.2d 953
(Fla. 5th DCA 1984), for the proposition

that an amendment to the guidelines cannot be applied retroactively, the district court concluded that Jackson was entitled to be sentenced under the guidelines in effect at the time the sentence was imposed. The state argues that the district court erred in so holding and contends that the current guidelines must be used in the resentencing process.

We agree with the state that the presumptive sentence established by the guidelines does not change the statutory limits of the sentence imposed for a particular offense. We conclude that a modification in the sentencing guidelines procedure, which changes how a probation violation should be counted in determining a presumptive sentence, is merely a procedural change, not requiring the application of the ex post facto doctrine. In Dobbert v. Florida, 432 U.S. 282 (1977), the United States Supreme Court upheld the imposition of a death sentence under a procedure adopted after the defendant committed the crime, reasoning that the procedure by which the penalty was being implemented, not the penalty itself, was changed. We reject Jackson's contention that Weaver v. Graham, 450 U.S. 24 (1981), should control in these circumstances.

Id., emphasis added.

Petitioner submits that pursuant to Jackson, the court below erred in considering the August 9, 1984, sentencing of Respondent on his probation violation, to which the amended guidelines were applied, to have violated ex post facto principles. The July 1, 1984 amendment to the guidelines involved here changed only how a probation violation is calculated into the presumptive sentence. It

did not in any way increase the presumptive sentence. Thus, the guidelines change was merely procedural and did not add to the quantum of punishment so its application to the Respondent did not violate ex post facto principles.

Jackson Id., Paschall v. Wainwright, 738 F.2d 1173, 1176 (11th Cir. 1984).

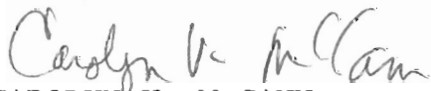
Petitioner therefore maintains that Respondent was properly sentenced under the amended guidelines in effect at the time of sentence for his violation of probation.

CONCLUSION

WHEREFORE, based upon the foregoing reasons and authorities, the State respectfully requests that the opinion of the Court of Appeal be reversed and remanded with directions to affirm the sentence imposed by the trial court.

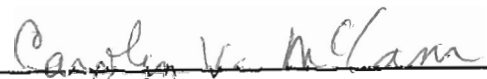
Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Petitioner's Brief On The Merits has been sent by courier to: Tatjana Ostapoff, Assistant Public Defender, 224 Datura Street, 13th Floor, West Palm Beach, Florida 33401, this 20th day of February, 1986.



Of Counsel