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IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,
Petitioner,

vs.

BEN ARNETT,
Respondent.

CASE NO. 67,478

PETITIONER'S REPLY 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

The State adopts the statement from its initial
brief.

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.

Petitioner is again compelled to point out that this case like State v. Jackson, 10 FLWSCO 564(Fla. Oct. 17, 1985), involves how a probation violation is scored. In the instant case, Respondent was placed on probation February 7, 1984, after pleading guilty to delivery of cannabis for consideration (R 3,31). An affidavit of probation violation was filed May 15, 1984 (R 33). At a hearing on August 9, 1984, the Court found Respondent in violation of his probation for failure to submit three monthly reports and to accurately report his address (R 16, 36). The Court sentenced Respondent to a term of twenty four 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 Respondent contends this Court's decision in Jackson, supra, is distinguishable from and thus not dispositive of the instant case. The State disagrees. The asserted distinction -- the fact that Jackson elected the guidelines whereas here the offenses were committed after their effective date -- makes no difference because the Court's opinion did not rest on this point. Rather, this Honorable Court in Jackson specifically holds:

[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.

Therefore, Jackson is controlling authority and requires reversal of the district court's opinion in the instant case.

Petitioner would further point out that the Fourth District -- the same court that decided the opinion here under review -- relying on Jackson rejected Respondent's arguments by stating:

Appellant contends that the version of the guidelines in effect at the time of commission of the offense applies rather than the later revision, relying on Miller v. State, 468 So.2d 1018 (Fla. 4th DCA 1985). The holding in that case has been implicitly disapproved by the Supreme Court of Florida. See State v. Jackson, 10 FLW 564 (Fla. Oct. 17, 1985).

Inscore v. State, 11 F.L.W. 73 (Fla. 4th DCA Dec. 26, 1985).

See also, Stacey v. State, 11 FLW 479 (Fla. 1st DCA Feb. 21, 1986); Wilkerson v. State, 11 FLW 45 (Fla. 1st DCA Dec. 23, 1985).

Respondent next argues matters which were essentially rejected by this Court's decision in Jackson, i.e., he continues to assert the application of the amended guidelines at his sentencing after their effective date was improper and ex post facto because he was placed on probation February 1984, and sentenced on his probation violation August 1984. The State maintains there was no ex post facto violation because retroactive application of procedural rules to offenses committed prior to their effective date is permissible, provided the rules are not more onerous than the law in existence at the time the offense was committed. Dobbert v. Florida, 432 U.S. 282 (1977); Paschal v. Wainwright, 738 F.2d 1173(11th Cir. 1984).

In Paschal v. Wainwright supra, the petitioner challenged the retroactive application of parole guidelines promulgated by the Florida Parole and Probation Commission pursuant to Fla. Stats. §947.001, et seq., claiming an ex post facto violation. The court held that since the commissioners' parole decision, both at the time of the petitioner's conviction and under the new guidelines, involved discretion and judgment, and only the form by which that discretion was exercised had been changed, there was

no ex post facto violation. As in Paschall, the promulgation of the guidelines does not alter the fact that trial judges may continue to have discretion in sentencing. The amended as well as the original guidelines changed only the procedural form in which the trial courts' inherent sentencing discretion is to be exercised.

The State therefore maintains, pursuant to State v. Jackson, supra, and Dobbert v. Florida, supra, that application of the amended guidelines to the Defendant who was sentenced on his violation of probation after their effective date was not ex post facto. The court in Dobbert rejected the claim that application of the new capital sentencing procedure (Fla. Stat. §921.141), enacted after the commission of the petitioner's crimes but prior to his trial, constituted an ex post facto violation. The court held:

Petitioner views the change in the Florida death sentencing procedure as depriving him of a substantial right to have the jury determine, without review by the trial judge, whether that penalty should be imposed. We conclude that the changes in the law are procedural, and on the whole ameliorative,⁶ [footnote omitted] and that there is no ex post facto violation.

* * *

In Beazell v. Ohio, 269 U.S. 167, 169-170, 70 L.Ed. 216, 46 S.Ct. 68(1925), Mr. Justice Stone summarized for the court the characteristics of an ex post facto law:

It is settled, by decisions of this Court so well known that their citation may be

dispensed with, that any statute which punishes as a crime an act previously committed, which was innocent when done; which makes more burdensome the punishment for a crime, after its commission, or which deprives one charged with crime of any defense available according to law at the time when the act was committed, is prohibited as ex post facto.

It is equally well settled, however, that "[t]he inhibition upon the passage of ex post facto laws does not give a criminal a right to be tried, in all respects, by the law in force when the crime charged was committed." Gibson v. Mississippi, 169 U.S. 565, 590, 41 L.Ed. 1075, 16 S.Ct. 904 (1896). "[T]he constitutional provision was intended to secure substantial personal rights against arbitrary and oppressive legislation, see Malloy v. South Carolina, 237 U.S. 180, 183 [59 L.Ed. 905, 35 S.Ct. 507], and not to limit the legislative control of remedies and modes of procedure which do not affect matters of substance." Beazell v. Ohio, *supra*, at 171, 70 L.Ed. 216, 46 S.Ct. 68.

Even though it may work to the disadvantage of a defendant, a procedure change is not ex post facto. For example, in Hopt v. Utah, 110 U.S. 574, 28 L.Ed. 262, 4 S.Ct. 202 (1884), as of the date of the alleged homicide a convicted felon could not have been called as a witness. Subsequent to that date, but prior to the trial of the case, this law was changed; a convicted felon was called to the stand and testified, implicating Hopt in the crime charged against him. Even though this change in the law obviously had a detrimental impact upon the defendant, the court found

that the law was not ex post facto because it neither made criminal a theretofore innocent act, nor aggravated a crime previously committed, nor provided greater punishment, nor changed the proof necessary to convict. Id., at 589, 28 L.Ed. 262, 4 S.Ct. 202.

In Thompson v. Missouri, 171 U.S. 380, 43 L.Ed. 204, 18 S.Ct. 922 (1898), a defendant was convicted of murder solely upon circumstantial evidence. His conviction was reversed by the Missouri Supreme Court because of the inadmissibility of certain evidence. Prior to the second trial, the law was changed to make the evidence admissible and defendant was again convicted. Nonetheless, the court held that this change was procedural and not violative of the Ex Post Facto Clause.

In the case at hand, the change in the statute was clearly procedural. The new statute simply altered the methods employed in determining whether the death penalty was to be imposed; there was no change in the quantum of punishment attached to the crime. The following language from Hopt v. Utah, supra, applicable with equal force to the case at hand, summarizes our conclusion that the change was procedural and not a violation of the Ex Post Facto Clause:

The crime for which the present defendant was indicted, the punishment prescribed therefor, and the quantity or the degree of proof necessary to establish his guilt, all remained unaffected by the subsequent statute.
110 U.S., at 589-590, 28 L.Ed. 262
4 S.Ct. 202.

In this case, not only was the change in the law procedural, it was ameliorative. It is axiomatic that for a law to be *ex post facto* it must be more onerous than the prior law. Petitioner argues that the change in the law harmed him because the jury's recommendation of life imprisonment would not have been subject to review by the trial judge under the prior law. But it certainly cannot be said with assurance that, had his trial been conducted under the old statute, the jury would have returned a verdict of life.

Hence, petitioner's speculation that the jury would have recommended life were the prior procedure in effect is not compelling.

Id. at 432 U.S. 292, 293, 294.

If retroactive application of capital sentencing procedures is not an ex post facto violation, then neither is the application of the amended guidelines to an offense committed prior to their effective date. The statutory maximum penalty for the offense has not been altered, and had the original guidelines been followed, the trial court still could have exceeded the applicable term by entering an order setting forth its reasons for departure. Fla. R. Crim. P. 3.701(d)(11).

The Defendant then argues the Florida Constitution, specifically Article X, Section 9, prohibits application of the amended guidelines. The State maintains this constitutional provision is inapplicable for there were no substantive changes affecting the punishment for criminal offenses: the statutory penalties have remained the same

and the guidelines are just a procedural change in the method of sentence imposition.

The Defendant's final argument is that since criminal rules of procedure should operate only prospectively, the amended guidelines cannot be applied to crimes committed prior to their effective date. The State maintains that since the amendments are to sentencing guidelines, it is reasonable that they be applied to all sentencings after their effective date. Thus, anyone sentenced up to and including June 30, 1984, would be sentenced pursuant to the original guidelines. From July 1, 1984, onward, the amended version of the guidelines applies and the amended guidelines have been applied prospectively.

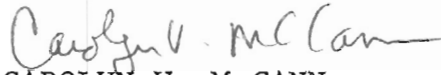
In conclusion, the Defendant states that adoption of his position will, as a matter of public policy, contribute uniformity and certainty to the sentencing procedure. On the contrary, the settling of this question in State v. Jackson, supra, has already accomplished these goals. There is a clear date, July 1, 1984, and all sentencings after it should be imposed pursuant to the amended guidelines.

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.

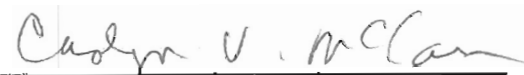
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Petitioner's Reply 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 31th day of March, 1986.



Of Counsel