

IN THE SUPREME COURT OF FLORIDA

67605

STATE OF FLORIDA,

Petitioner,

v.

LENARD TAYLOR,

Respondent.

CASE NO. 67605

FILED

SID J. WHITE

SEP 9 1985

CLERK, SUPREME COURT

By [Signature]
Chief Deputy Clerk

PETITIONER'S BRIEF ON JURISDICTION

JIM SMITH
ATTORNEY GENERAL

KEVIN KITPATRICK CARSON
ASSISTANT ATTORNEY GENERAL
125 N. Ridgewood Ave.
Fourth Floor
Daytona Beach, Fl. 32014
(904) 252-1067

COUNSEL FOR PETITIONER

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STATEMENT OF THE CASE AND FACTS

Respondent was charged by a two-count information with burglary of a dwelling and grand theft. The alleged offenses occurred on March 1, 1984. At trial on June 22, 1984, a jury found respondent guilty of burglary of a dwelling and acquitted respondent of grand theft. Amendments to the sentencing guidelines took effect on July 1, 1984. Respondent was sentenced on August 24, 1984. The trial court sentenced respondent pursuant to the amended guidelines which were in effect on the date of sentencing.

Respondent appealed his sentence to the Fifth District Court of Appeal. The district court of appeal on motion for rehearing by the respondent, reversed the sentence of the trial court, holding that the application of the amended sentencing guidelines to an offense which occurred prior to the enactment of the amendment is a violation of the ex post facto doctrine of Article 1, Section 10 of the Florida Constitution and Article I, Section 10 of the United States Constitution (App. A). A motion for rehearing filed by petitioner was denied (App. B).

SUMMARY OF ARGUMENT

The decision of the Fifth District Court of Appeal expressly construes a provision of the federal and state constitution and is in express and direct conflict with other decisions of this honorable court. As such, this court should exercise its discretionary jurisdiction to review that decision.

POINT I

THIS COURT SHOULD EXERCISE ITS DISCRETIONARY JURISDICTION TO REVIEW THE DECISION OF THE DISTRICT COURT OF APPEAL WHICH EXPRESSLY CONSTRUES PROVISIONS OF THE FLORIDA AND UNITED STATES CONSTITUTION.

ARGUMENT

On August 24, 1984, the trial court sentenced the respondent pursuant to the amended sentencing guidelines which were in effect at the time of sentencing. See, The Florida Bar: Amendment to Rules of Criminal Procedure - (3.701,3.988-Sentencing Guidelines, 451 So.2d 824 (Fla. 1984). The offense for which respondent was convicted occurred on March 1, 1984. The amended sentencing guidelines became effective on July 1, 1984. See, Ch. 84-328, Laws of Fla. The Fifth District Court of Appeal reversed the sentence holding that the application of the amended sentencing guidelines to an offense which occurred prior to the amendment is a violation of the ex post facto doctrine of the United States Constitution and Florida Constitution. See, Art.I, § 10, U.S. Const. and Art. I, § 10, Fla. Const.

In reversing the sentence imposed by the trial court, petitioner contends that the Fifth District Court of Appeal erroneously construed provisions of the Florida and United States Constitution. This court has jurisdiction pursuant to Article V, Section 3(b)(3), Florida Constitution, and Florida Rule of Appellate Procedure 9.030(a)(2)(A)(ii).

POINT II

THIS COURT SHOULD EXERCISE ITS DISCRETIONARY JURISDICTION TO REVIEW THE DECISION OF THE DISTRICT COURT OF APPEAL WHICH EXPRESSLY AND DIRECTLY CONFLICTS WITH A DECISION OF THIS COURT ON THE SAME QUESTION OF LAW.

The decision of the Fifth District Court of Appeal expressly and directly conflicts with the decisions of this court in May v. Florida Parole and Probation Commission, 435 So. 2d 834 (Fla. 1983), and Lee v. State, 294 So.2d 305 (Fla. 1974).

In May, May was serving a prison sentence for several felony convictions. His parole release date (PPRD) was originally set for July 31, 1984. On May 30, 1981, May was convicted of an offense while still in prison. Based upon this conviction, the Parole Commission using his present and previous convictions recalculated his PPRD based upon new parole guidelines adopted September 10, 1981. His new PPRD was October 4, 1994, an extension of almost ten years beyond his original PPRD.

On appeal to this court, May contended that the parole date guideline adopted after the commission of his in-prison offense could not be used to recalculate his PPRD for that offense and that doing so was an unconstitutional application of more stringent guidelines. This court disagreed and approved application of the new guidelines saying:

. . . [W]here a prisoner can establish no more than a tenuous expectancy regarding probable punishment under the law existing at the time of his offense it becomes difficult or impossible to establish (a critical ex post facto element) . . . that the retrospectively applied law disadvantages the offender affected by it.

435 So.2d at 836.

Similarly, in the instant case, respondent has at best nothing more than a tenuous expectancy regarding his punishment under the sentencing guidelines and the decision of the district court of appeal directly conflicts with this principle of law.

In Lee, this court stated:

If the subsequent statute merely re-enacted the previous penalty provision without increasing any penalty provision which could have been imposed under the statute in effect at the time of the commission of the offense. then there could be no application of a subsequent penalty provision which would do violence to the concept of an ex post facto law. (Emphasis in the original),
294 So.2d at 307.

The amendments to the sentencing guidelines merely change the procedure for arriving at a recommended guidelines sentence. Thus, there is no ex post facto application of the amended guidelines to the respondent, since the penalty provisions for offenses proscribed by general law have not increased. Additionally, even though it may work to the disadvantage of a defendant, a procedural change is not ex post facto. Dobbert v. Florida, 432 U.S. 282, 293, 97 S.Ct. 2290, 2298, 53 L.Ed.2d 344 (1977).

Since the decision in the instant case conflicts with the rules of law set forth in May, supra, and Lee, supra, this court has jurisdiction.

CONCLUSION

Based on the above and foregoing arguments and authorities presented herein, the court should exercise its jurisdiction favorably and review the decision of the Fifth District Court of Appeal.

Respectfully submitted,

JIM SMITH
ATTORNEY GENERAL

Kevin K. Carson

KEVIN KITPATRICK CARSON
ASSISTANT ATTORNEY GENERAL
125 N. Ridgewood Ave.
Fourth Floor
Daytona Beach, Fl. 32014
(904) 252-1067

COUNSEL FOR PETITIONER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing Petitioner's Brief On Jurisdiction has been furnished by mail to Lucinda H. Young, Assistant, Assistant Public Defender, and counsel for the respondent, this 6 day of September, 1985.

Kevin K. Carson

KEVIN KITPATRICK CARSON
COUNSEL FOR PETITIONER