

IN THE SUPREME COURT
STATE OF FLORIDA

FILED

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CLERK, SUPREME COURT

By [Signature]
Chief Deputy Clerk

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STATE OF FLORIDA,

Petitioner,

v.

CASE NO. 67,605

LENARD TAYLOR,

Respondent.

_____ /

PETITIONER'S REPLY BRIEF
ON THE MERITS

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POINT ON APPEAL

IN REPLY TO RESPONDENT'S ASSERTION THAT APPLYING AN AMENDMENT TO THE SENTENCING GUIDELINES RETROSPECTIVELY TO AN OFFENSE COMMITTED PRIOR TO ITS ENACTMENT WHICH INCREASES A DEFENDANT'S SENTENCE IS A VIOLATION OF THE EX POST FACTO CLAUSES OF THE FLORIDA AND UNITED STATES CONSTITUTIONS.

ARGUMENT

Respondent asserts that the application of the amended sentencing guidelines which were in effect at the time of his sentencing, violates the ex post facto clauses of the Florida and the United States Constitutions because they make more burdensome the punishment for a crime after its commission and are, thus, more onerous than the prior law. His basic premise in support of this proposition is that, at the time of the commission of his offense, he was "subject to" (Answer brief of respondent, p.2), and "could expect to receive" (Id., p.3), a maximum sentence of three years, including prison and probation. This premise is in error in at least two respects.

The first error in respondent's reasoning is the assertion that, at the time of the commission of his offense, he was "subject to" a total sentence of three years under the sentencing guidelines then in effect. Respondent was convicted of burglary of a dwelling, a violation of Florida Statute 810.02(3) (1983), and was thereby subject to punishment as provided in Florida Statutes 775.082, 775.083, or 775.084 (1983). Respondent was subject to a term of imprisonment, not exceeding fifteen years, a fine of ten thousand dollars (\$10,000), and habitual offender consideration. The amended guidelines did not increase

the penalty for respondent's offense. The penalty which was prescribed for respondent's offense and to which he was subject at the time of his offense remained the same at the time of his sentencing.

The second error in respondent's reasoning, is the assertion that, at the time of the commission of his offense, he "could expect" to receive a particular sentence, a maximum sentence of three years, including prison and probation. Respondent had no right to such an expectation. The sentencing guidelines do not establish a substantive right in behalf of a defendant, rather, they establish guidelines for judges. As is explicitly pointed out in the guidelines, "the purpose of sentencing guidelines is to establish a uniform set of standards to guide the sentencing judge in a sentence decision-making process." Fla. R. Crim. P. 3.701(b). (Emphasis supplied). Thus, the sentencing guidelines give respondent no right to expect a particular sentence or recommended sentence at the time of his offense. The continuously developing nature of the sentencing guidelines belies any such expectation.

That respondent has no right to expect a particular recommended sentence, contrary to respondent's contention, is supported by the fact that the sentencing guidelines is subject to amendment from year to year. § 921.001(4)(b), Fla. Stat. (1983). At the time of his offense, respondent was on notice that the Sentencing Guidelines Law reserved the right of the Sentencing Commission to periodically evaluate the guidelines and recommend changes on a continuing basis. § 921.001(1)and(3),

Fla. Stat. (1983). As a result, respondent was given fair warning that the guidelines under which his recommended sentence would be determined were subject to change. Indeed, "it would create endless confusion in legal proceedings if every case was to be conducted only in accordance with rules of practice . . . in existence when its facts arose." Mallet v. North Carolina, 181 U.S. 589, 21 S.Ct. 730, 733, 45 L.Ed. 1015 (1901). Respondent's right to appeal a sentence departing from the guidelines in effect at the time of sentencing remains intact under the amended guidelines.

The proposition of law enunciated by this court in May v. Florida Parole and Probation Commission, 435 So.2d 834 (Fla. 1983), that where a person can establish no more than a tenuous expectancy regarding probable punishment under the guidelines existing at the time of his offense, it becomes difficult or impossible to establish that the retrospectively applied law disadvantages the offender affected by it (a critical ex post facto element, is applicable to the instant appeal. Sentencing remains subject to judicial discretion. It is clear that various unscored factors may be used to depart from a recommended sentence. See, Weems v. State, 469 So.2d 128 (Fla. 1985); Hendrix v. State, 475 So.2d 1218 (Fla. 1985). Just as the recommendation of the prosecutor or of a plea agreement was not binding on the judge prior to the implementation of the sentencing guidelines, the recommended sentence of the sentencing guidelines is not binding on the judge. Practically speaking, with regard to a particular sentence, prior to actual sentencing, a defense at-

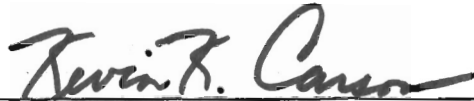
torney can assure the defendant of nothing regarding a sentence, other than that the sentence cannot exceed the maximum penalty prescribed by law. The existence of judicial discretion truly leaves a criminal defendant with nothing more than a tenuous expectancy regarding his punishment under the sentencing guidelines. Since a critical ex post facto element cannot be established, the application of the sentencing guidelines in effect at the time of sentencing is not prohibited by the ex post facto clauses of the Florida and United States Constitutions.

CONCLUSION

Based on the arguments and authorities presented herein, petitioner respectfully prays this honorable court reverse the decision of the District Court of Appeal, Fifth District.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing Petitioner's Reply Brief on the Merits has been furnished by mail to Michael I. O'Neill, Assistant Public Defender, 112 Orange Avenue, Suite A, Daytona Beach, Florida 32014, counsel for the respondent, this 7 day of February, 1986.



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