

IN THE SUPREME COURT OF FLORIDA

FILED
S. J. WHITE
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Chief Deputy Clerk

STATE OF FLORIDA,

Petitioner,

v.

ALPHONSE GRIFFIN,

Respondent.

CASE NO. 67713

PETITIONER'S BRIEF ON JURISDICTION

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STATEMENT OF THE CASE AND THE FACTS

Respondent was charged by amended information with battery on a law enforcement officer while armed with a firearm, possession of cocaine, felony possession of marijuana, and grand theft. The alleged offenses occurred on June 14, 1984. Amendments to the sentencing guidelines took effect on July 1, 1984. On November 8, 1984, respondent pled guilty to the charges of battery on a law enforcement officer while armed with a firearm and grand theft, and nolo contendere to possession of cocaine and felony possession of marijuana.

Respondent appeared for sentencing on December 7, 1984. The recommended guidelines sentence was community control or 12-30 months incarceration. Noting that a statutory mandatory minimum sentence of three years was required on the battery charge, the sentencing judge disregarded the scoresheet and its thirty month cap on incarceration and sentenced respondent to the mandatory three years followed by five years probation on the remaining counts.

Respondent appealed his sentence to the Fifth District Court of Appeal. The district court of appeal reversed the sentence of the trial court, agreeing with respondent's contention that he was entitled to be sentenced according to the guidelines in effect at the time the offenses were committed, rather than under the amended guidelines which were in effect at the time of his plea and sentencing.

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 CONSTITUTIONS.

ARGUMENT

In holding that the sentencing guidelines at the time of the offense, rather than at the time of sentencing, were the applicable guidelines under which respondent was required to be sentenced, the district court of appeal relied upon its decision in Brown v. State, 460 So.2d 427 (Fla. 5th DCA 1984). In Brown, the district court of appeal reversed Brown's sentence for arson, of eight years imprisonment followed by seven years probation, holding that the provisions of the Correctional Reform Act of 1983, Ch. 83-131, Laws of Fla., could not be applied retroactively. Citing Weaver v. Graham, 450 U.S. 24, 101 S.Ct. 960, 67 L.Ed.2d 17 (1981), the district court in Brown, held that since the offense for which Brown was sentenced occurred prior to the effective date of the Reform Act, and the new sentencing alternatives were more onerous to Brown, it violated the ex post facto clause to apply the Reform Act to Brown.

In the instant appeal, the offenses for which respondent was convicted occurred on June 14, 1984. The amended sentencing guidelines took effect on July 1, 1984. See, Ch. 84-328, Laws of Fla.. Under the guidelines in effect at the time of sentencing, respondent's sentence would be an appropriate sentence. Respondent pled guilty and was sentenced after the

amended guidelines became effective. In reversing the trial court, relying on Brown, supra, and agreeing with the respondent that respondent was entitled to be sentenced according to the guidelines in effect at the time the offenses were committed, the district court of appeal construed the ex post facto doctrine of the Florida and United States Constitutions. 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 Constitutions. This court has jurisdiction pursuant to Article 5, 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 DECISIONS OF THIS COURT ON THE SAME QUESTION OF LAW.

ARGUMENT

In reversing the sentence imposed by the trial court below, the Fifth District Court of Appeal held that sentencing guidelines adopted after the commission of respondent's offenses could not be used to calculate the recommended range for sentencing and sentenced respondent. The decision of the district court of appeal conflicts with the same point of law decided by this court in May v. Florida Parole and Probation Commission, 435 So.2d 834 (Fla. 1983), and the decision of this court in 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 inprison 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. The sentencing guidelines are subject to amendment from year to year, section 921.001(4) (b), Florida Statutes (1984), and a trial court is not required to inform a defendant prior to sentencing that it intends to depart from the recommended sentence and the reasons therefor. Mincey v. State, 460 So.2d 396 (Fla. 1st DCA 1984). The decision of the district court of appeal directly conflicts with this principle of law.

In Lee, supra, this court stated:

If the subsequent statute merely reenacted 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 pro-

visions 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); Hopt v. Utah, 110 U.S. 574, 4 S.Ct. 202, 28 L.Ed. 262, n.12 (1884).

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.¹

¹To this writer's knowledge, this issue is present in pending petitions for discretionary review in the cases of State v. Miller, Case No. 67,276; State v. Mott, Case No. 67,278; State v. Fletcher, Case No. 67,275; State v. Moore, Case No. 67,281; State v. Taylor, Case No. 67,605.

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing Petitioner's Brief on Jurisdiction has been furnished by delivery to James R. Wulchak, Assistant Public Defender, 112 Orange Avenue, Daytona Beach, Florida 32014, and counsel for the respondent, this 1 day of October, 1985.

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