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IN THE SUPREME COURT
STATE OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

CASE NO. 67,713

ALPHONSE GRIFFIN,

Respondent.
_____/

PETITIONER'S BRIEF ON THE MERITS

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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 (R 46-47). The alleged offenses occurred on June 14, 1984. At the time respondent committed these crimes, Committee Note (d)(12) to Florida Rule of Criminal Procedure 3.701, provided in relevant part:

> If a split sentence is imposed (i.e., a combination of state prison and probation supervision), the incarcerative portion imposed shall not be less than the minimum of the guideline range, and the total sanction imposed cannot exceed the maximum guideline range.

That rule was subsequently amended on July 1, 1984.

Committee Note (d)(12) now reads:

> If a split sentence is imposed (i.e., a combination of state prison and probation supervision), the incarcerative portion imposed shall not be less than the minimum of the guidelines range, nor exceed the maximum of the range. The total sanction (incarceration and probation) shall not exceed the term provided by general law.

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 (R 30-31).

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 (R 3-5).

Respondent appealed his sentence to the Fifth District Court of Appeal (R 15). 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 (App. A).

Petitioner filed a timely notice of appeal and this court accepted jurisdiction.

SUMMARY OF ARGUMENT

The sentencing guidelines are procedural rules designed to guide circuit judges in their use of discretion in sentencing throughout Florida. They were not intended to usurp judicial discretion. Since a defendant can demonstrate nothing more than a tenuous expectancy regarding his punishment under the guidelines, a critical element of the ex post facto doctrine (that the retrospectively applied law disadvantages the offender by increasing the punishment prescribed for the offense) cannot be established.

Even if this court were to find that the ex post facto doctrine prevented application of the guidelines in effect at the time of sentencing, the sentence in this appeal would be proper. When the mandatory minimum sentence exceeded the guidelines recommended sentence, the recommended range became inapplicable and the mandatory minimum took precedence, making it unnecessary for the sentencing judge to justify departing from the guidelines. There is nothing in the guidelines restricting the judge only to imposition of the mandatory minimum sentence, when that sentence exceeds the recommended range.

POINT ON APPEAL

THE APPLICATION OF THE SENTENCING GUIDELINES IN EFFECT AT THE TIME OF SENTENCING IS CONSISTENT WITH THE EX POST FACTO CLAUSES OF THE FLORIDA AND UNITED STATES CONSTITUTIONS.

ARGUMENT

In holding that the sentencing guidelines at the time of the offenses were committed, rather than at the time of sentencing, were the applicable guidelines under which respondent was required to be sentenced, the Fifth District Court of Appeal, in relying on its decision in Brown v. State, 460 So.2d 427 (Fla. 5th DCA 1984), effectively held that to do otherwise would violate the ex post facto clauses of the Florida and United States Constitutions. Petitioner respectfully disagrees.

The United States Supreme Court has held that in order for a law to be forbidden as ex post facto, the law must be criminal or penal in nature; it must apply to events occurring before its enactment (be retrospective) and, it must disadvantage the offender affected by it, that is, it must increase the punishment prescribed for the offense. Weaver v. Graham, 450 U.S. 24, 101 S.Ct. 960, 67 L.Ed.2d 17 (1981); Paschal v. Wainwright, 738 F.2d 1173 (11th Cir. 1984). This court has recognized these critical elements in May v. Florida Parole and Probation Commission, 435 So.2d 834 (Fla. 1983).

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 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.

403 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. § 921.001(4)(b), Fla. Stat. (1984). 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 a recommended sentence would be determined were subject to change and that his sentence would be subject to judicial discretion. 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 therefore. Mincey v. State, 460 So.2d 396 (Fla. 1st DCA 1984). The constitution deals with substance, not shadows. Weaver, supra, 450 So.2d 32 & n.15, 101 S.Ct. at 965 & n.15. Respondent's only substantive guarantee was that the court could not sentence him above the maximum penalty provided by law. Respondent's right to appeal a sentence departing from the guidelines in effect at the time of sentencing remains unaffected by the amended guidelines.

In Lee v. State, 294 So.2d 305 (Fla. 1974), 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.

Since the amended sentencing guidelines have no effect on the penalty provisions prescribed for the violation of the various criminal statutes, there is no ex post facto violation.

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 the sentence decision-making process." Fla. R. Crim. P. 3.701(b). (Emphasis supplied). They were not intended to usurp judicial discretion. Fla. R. Crim. P. 3.701(b)(6). The amendments to the guidelines

merely change the procedure for determining a recommended sentence, not requiring the application of the ex post facto doctrine. State v. Jackson, 478 So.2d 1054 (Fla. 1985). 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).

Even if this court were to find that the Ex Post Facto Clause prevented application of the guidelines in effect at the time of sentencing, the sentence in this appeal would be proper. The recommended sentence was community control or 12-30 months incarceration. A mandatory minimum sentence of three years was required on the battery charge.

Florida Rule of Criminal Procedure 3.701(d)(9) provides that where the recommended sentence is less than the mandatory minimum sentence, the mandatory sentence takes precedence. In the instant appeal, the mandatory minimum sentence automatically took precedence over the lesser guidelines sentence, making it unnecessary for the sentencing judge to justify departing from the guidelines. Walker v. State, 473 So.2d 694 (Fla. 1st DCA 1985). Although dealing with guidelines sentencing, the sentencing judge was not dealing with a departure from a recommended sentence for which Rule 3.701 requires a clear and convincing reason for departure.

There is no requirement that a clear and convincing reason be given for the application of the mandatory minimum sentencing provisions. There is no requirement that he impose only

the mandatory minimum. As such, there is no restriction on a judge sentencing a defendant to prison time, in addition to the mandatory minimum, so that gain time, which would otherwise be available with a recommended guidelines sentence, would be available as incentive for a defendant's good behavior. Otherwise, a defendant would serve a straight prison sentence, without such incentive, since an inmate serving a mandatory sentence is disqualified from receiving gain time. § 775.087(2), Fla. Stat. (1983); Fla. Admin. Code Rule 33-11.036(6). Likewise, the imposition of probation upon the respondent following the mandatory sentence, would require no clear and convincing reasons for imposition under the guidelines in effect at the time of the offense.

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT JULY TERM 1985

ALPHONSE GRIFFIN,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

NOT FINAL UNTIL THE TIME EXPIRES TO FILE REHEARING MOTION, AND, IF FILED, DISPOSED OF.

Case No. 85-12

Opinion filed September 5, 1985

Appeal from the Circuit Court for Osceola County, Cecil H. Brown, Judge.

James B. Gibson, Public Defender, and James R. Wulchak, Chief, Appellate Division, Assistant Public Defender, Daytona Beach, for Appellant.

Jim Smith, Attorney General, Tallahassee, and Gary M. Tinsley, Assistant Attorney General, Daytona Beach, for Appellee.

ORFINGER, J.

This is an appeal from a guidelines sentence. Griffin contends that the sentence exceeds the guidelines because the combination of incarceration and probation exceeds the total permissible sanction. We agree.

On June 14, 1984, Griffin was charged with battery on a law enforcement officer while armed with a firearm, grand theft, possession of cocaine and possession of cannabis over twenty grams. He plead guilty to the first two charges, and nolo contendere to the last two charges. His guidelines score-sheet totaled 125 points, suggesting a sentence of community control or 12-30 months' incarceration. The trial court correctly sentenced Griffin to the mandatory minimum sentence of three years' incarceration required by section 775.087(2), Florida Statutes (1983), because the mandatory penalty exceeds the guideline sentence. Fla.R.Crim.P. 3.701(d)(9). The correctness of this portion of the sentence is not questioned on appeal.

Appellant is correct in his assertion that he was entitled to be sentenced in accordance with the guidelines in effect when the crimes were committed. See Brown v. State, 460 So.2d 427 (Fla. 5th DCA 1984). Committee note (d)(12) to Florida Rule of Criminal Procedure 3.701(d)(12) as it existed prior to its amendment on July 1, 1984, provided:

> If a split sentence is imposed (i.e., a combination of state prison and probation supervision), the incarcerative portion imposed shall not be less than the minimum of the guideline range, and the total sanction imposed cannot exceed the maximum guideline range.

Although this court has split on the question of whether sentences such as are imposed here are truly "split sentences," we are bound by the recent decision of this court that says they are. O'Brien v. State, 10 F.L.W. ____, (Fla. 5th DCA Aug. 15, 1985). Therefore it was improper in this case to impose a sanction greater than the mandatory minimum sentence, without stating a written reason for departure. Fla.R.Crim.P. 3.701(d)(12), supra.

The three year sentence of incarceration is affirmed. The three concurrent terms of probation are vacated and shall not be imposed unless the trial court states a clear and convincing reason for departure.

AFFIRMED in part, REVERSED in part, and REMANDED.

DAUKSCH and SHARP, W., J.J., concur.

APP. A

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 Brief on the Merits has been furnished by mail to James R. Wulchak, Assistant Public Defender, 112 Orange Avenue, Suite A, Daytona Beach, Florida 32014, counsel for the respondent, this 19 day of February, 1986.

Kevin K. Carson

KEVIN KITPATRICK CARSON
COUNSEL FOR PETITIONER