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IN THE SUPREME COURT
STATE OF FLORIDA



FEB 14 1968

By [Signature]
Clerk of the Court

STATE OF FLORIDA,
Petitioner,

v.

CASE NO. 67,787

JESSE JAMES TISDALE,
Respondent.

_____ /

PETITIONER'S BRIEF ON THE MERITS

JIM SMITH
ATTORNEY GENERAL

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

COUNSEL FOR PETITIONER

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STATEMENT OF THE CASE AND OF THE FACTS

Respondent was charged by a two count information with burglary of a dwelling and petit theft (R 211). The alleged offenses occurred on June 6, 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.

At trial on October 27, 1984, a jury found respondent guilty of burglary of a dwelling and acquitted him of grand theft (R 179). Respondent was sentenced on November 30, 1984. The recommended guidelines sentence was "community control or 12-30 months incarceration (R 237). Respondent was sentenced, pursuant to the amended guidelines which were in effect at the time of sentencing, to 30 months in prison followed by five (5) years probation (R 205-209).

Respondent appealed his sentence to the Fifth District Court of Appeal (R 245). 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 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.

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 decisions in Joyce v. State, 466 So.2d 433 (Fla. 5th DCA 1985) and Hurst v. State, 474 So.2d 280 (Fla. 5th DCA 1985), 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 guidelines 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

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.

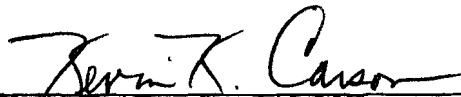
Fla. R. Crim. P. 3.701(b)(6). The amendments to the guidelines merely change the procedure for determining a recommended sentence, not requiring the application of the ex post facto doctrine. State v. Jackson, 478 So.2d 1054 (Fla. 1985). Even though it may work to the disadvantage of a defendant, a procedural 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).

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,

JIM SMITH
ATTORNEY GENERAL



KEVIN KITPATRICK CARSON
ASSISTANT ATTORNEY GENERAL
125 N. Ridgewood Avenue
Fourth Floor
Daytona Beach, Florida 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 the Merits has been furnished by mail to Daniel J. Schafer, Assistant Public Defender, 112 Orange Avenue, Suite A, Daytona Beach, Florida 32014, counsel for the respondent, this 25 day of February, 1986.



KEVIN KITPATRICK CARSON
COUNSEL FOR PETITIONER