IN THE FLORIDA SUPREME COURT

STATE OF FLORIDA, :

Petitioner, :

vs. : Case No. 68,030

LINDA PETE, a/k/a Linda L. Thomas, :

Respondent. :

:

DISCRETIONARY REVIEW OF DECISION OF
DISTRICT COURT OF APPEAL
SECOND DISTRICT OF FLORIDA

BRIEF OF RESPONDENT ON THE MERITS

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

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TABLE OF CONTENTS

TABLE OF CITATIONS

STATEMENT OF THE CASE AND FACTS

Respondent accepts the "Statement of the Case and Facts" presented in petitioner's brief with the addition of the following facts:

1. When Respondent entered her pleas of guilty on May 29, 1984, she was not informed that the court could impose a greater punishment under the sentencing guidelines without giving reasons for departure if sentencing was delayed beyond the scheduled sentencing date of June 29, 1984.

2. Respondent was incarcerated in the Hillsborough County Jail on June 29, 1984, the scheduled sentencing date. However, she was not brought before the court on that date. (R1,28,54,79,105,131,157) Sentencing was rescheduled to July 13, 1984.

SUMMARY OF ARGUMENT

Contrary to petitioner's belief, this Court's decision in State v. Jackson, 478 So.2d 1054 (Fla.1985) did not decide that all amendments to the Sentencing Guidelines must be merely procedural and therefore subject to retroactive application. The amendment to the Committee Note to Fla.R.Cr.P. 3.701(d)(12) effective July 1, 1984 did more than alter the scoring on a guidelines scoresheet; it permitted an enhanced period of probation independent of the presumptive sentence range. In effect, it also cut off the defendant's right to appellate review of the sentencing judge's discretion in imposing a split sentence where the probationary period was equal to the statutory maximum. Such an amendment impacts upon the "substantial personal rights" secured against retroactive legislation by the ex post facto clauses of the Florida and United States Constitutions. Accordingly, the Second District correctly decided that this particular amendment to the sentencing guidelines could not be retroactively applied.

Moreover, Respondent entered her pleas of guilty and was scheduled to be sentenced before the effective date of the amendment. Her sentencing was delayed through no fault of her own. Since she was not advised of the consequences of a delay in sentencing, her guilty pleas are invalid unless the extended terms of probation are struck.

ARGUMENT

WHETHER THE TRIAL COURT PROPERLY APPLIED THE RULE IN EFFECT AT SENTENCING?

Petitioner is totally incorrect when he asserts that this Court has "previously disposed of the exact question of law [presented at bar] in State v. Jackson, 478 So.2d 1054 (Fla.1985)." Brief of Petitioner, p.3. The opinion of the Second District in the case at bar discusses an amendment to Fla.R.Cr.P. 3.701(d)(12) which was not even presented by the Jackson case. Jackson considered whether a guidelines modification changing how a probation violation should be scored in determining a presumptive sentence was a procedural change not offensive to ex post facto provisions of the federal and state constitutions. By contrast, the amendment to the guidelines implicated in the case at bar does not change the presumptive sentence at all; but does it allow an enhanced sentence to be imposed without requiring written reasons for departure and cuts off the defendant's right to appellate review of the length of this sentence.

When Respondent committed her offenses and when she entered her guilty pleas, Fla.R.Cr.P. 3.701(d)(12) provided:

> Sentencing for separate offenses: A sentence must be imposed for each offense. However, the total sentence cannot exceed the total guideline sentence unless a written reason is given.

The Committee Note in the pre-July, 1984 version explained:

> The sentencing court shall impose or suspend sentence for each separate count, as convicted. The total sentence shall not

> exceed the guideline sentence, unless the provisions of paragraph 11 are complied with.
>
> 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. [Emphasis supplied]

This was also the version of the Rule which was in force when Respondent was scheduled to be sentenced, June 29, 1984.

By the date when Respondent was actually sentenced, July 13, 1984, an amended committee note to Fla.R.Cr.P. 3.701 (d)(12), adopted by this Court on May 8, 1984, had been approved by the legislature and made effective July 1, 1984. Ch.84-328, Laws of Florida (1984). This amended committee note reads:

> (d)(12) The sentencing court shall impose or suspend sentence for each separate count, as convicted. The total sentence shall not exceed the guideline sentence, unless the provisions of paragraph (11) are complied with.
>
> 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 nor exceed the maximum of the range. The total sanction (incarceration and probation) shall not exceed the term provided by general law.

The Committee Notes to the sentencing guidelines have been adopted by the Florida Supreme Court as an integral part of the Rules of Criminal Procedure. The Florida Bar: Amendment to Rules of Criminal Procedure (3.701, 3.988 - Sentencing Guidelines), 451 So.2d 824 (Fla.1984).

Evidently, the Second District construed the amendment to the Committee Note as providing that a split sentence not exceeding the statutory maximum is not a guidelines departure sentence. The actual adoption of the modification explains the change differently:

> 13) The Committee Note to 3.701(d)(12) has been revamped. This language will permit the sentencing court to impose probation terms consecutive to prison sentences, limited in length only by general law.

451 So.2d at 824, f.n.13. As such, the amendment appears more to be an affirmation that a split sentence within statutory limits remains a legal sentence under the guidelines. Whether such a sentence is within the guidelines or is a departure sentence requiring written reasons was not directly addressed by the amendment.

Putting aside the question of whether the Second District misconstrued the purpose of the amendment, it remains clear that this particular amendment to the sentencing guidelines cannot be applied retroactively without impacting upon ex post facto considerations. Petitioner's sole reliance upon State v. Jackson, supra is misplaced. The Jackson majority emphasized that the sentencing judge retains sentencing discretion under the guidelines, limited by the statutory penalties. The presumptive sentence range calculated on the guidelines scoresheet operates as a framework for the sentencing judge's exercise of discretion. Departure from the recommended range is reviewable on an abuse of discretion standard. Albritton v. State, 476 So.2d 158 (Fla.1985). Thus, a change in scoring which affects the length of the presumptive sentence

is only a procedural change. Cf., Portley v. Grossman, 444 U.S. 1311, 100 S.Ct. 714, 62 L.Ed.2d 723 (1980). An offender has no expectation of receiving any specific length of sentence absent clear and convincing reasons for departure; he only has an expectation of receiving a sentence within the presumptive range of the sentencing judge's discretion.

A different situation occurs when an amendment to the sentencing guidelines permits a different or enhanced penalty to be imposed independent of the presumptive sentence range. The July 1, 1984 amendment to the Committee Note of Fla.R.Cr.P. 3.701(d)(12) allowed a greater period of probation to be imposed in a split sentence. Not only is this an enhanced quantum of punishment, but because of the possibility that the probation might be revoked, the amendment also potentially increases drastically the amount of prison time the offender will serve for his offense. Another substantive right directly affected is the right to appellate review of sentence under §924.06(1)(e), Fla.Stat. (1983) and Fla.R.Ap.P. 9.140(b)(1)(E). These are the type of "substantial personal rights" intended to be secured against retroactive legislation by the ex post facto clause. See Dobbert v. Florida, 432 U.S. 282 at 293, 97 S.Ct. 2290, 53 L.Ed.2d 344 (1977).

The appropriate analysis to determine whether legislation violates the Article I, Section 10 of the Florida Constitution or Article I, Section 10 of the United States Constitution prohibitions against ex post facto legislation requires consideration of a two-prong test:

1) Does the law attach legal consequences to crimes committed before the law took effect, and
2) Does the law affect the prisoners who committed those crimes in a disadvantageous fashion?

State v. Williams, 397 So.2d 663 (Fla.1981); Weaver v. Graham, 450 U.S. 24, 101 S.Ct. 960, 67 L.Ed.2d 17 (1981).

Utilizing this test on the facts at bar we see that the amendment to the Rule was applied by the trial court to crimes committed before July 1, 1984. Respondent was affected disadvantageously because she must serve an extended term of probation without being allowed appellate review of the trial court's sentencing discretion. Consequently, the Second District correctly decided in the case at bar that the July 1, 1984 amendment to the Committee Note to Fla.R.Cr.P. 3.701(d)(12) could not be retroactively applied.

A second basis for reversal of Respondent's sentence is also apparent. When she entered her pleas on May 29, 1984 she was scheduled for sentencing on June 29, 1984. Since both these dates were prior to the effective date of the guidelines amendment, she expected a penalty within the framework of the existing guidelines. Through no fault of her own, she was not brought from the jail to the courtroom on the scehduled sentencing date. This delay in sentencing is attributable to State action and allowed the enhanced penalty to be imposed without affording her a right to review of the sentencing judge's reasons.

This factual scenario impacts upon the validity of the guilty pleas entered by Respondent. Due process considera-

tions of the Fifth and Fourteenth Amendments to the United States Constitution require that the waiver of constitutional rights inherent in a plea of guilty must be made with full knowledge of the consequences of the plea. Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969). A plea is not voluntary if the defendant is not fully aware of the direct consequences. Brady v. United States, 397 U.S. 742 at 755, 90 S.Ct. 1463, 24 L.Ed.2d 747 (1970).

In State v. Green, 421 So.2d 508 (Fla.1982), this Court invalidated a guilty plea where the defendant was not fully advised of the consequences of his plea when it was entered. Much like the defendant in Green, Respondent at bar was not advised that she could receive additional probation if her sentencing was delayed. Accordingly, this case should be remanded to the trial court with instructions that either the fifteen year concurrent terms of probation should be struck or Respondent should be allowed to withdraw her plea.

CONCLUSION

Based upon the foregoing argument, reasoning and authorities, Linda Pete, Respondent, respectfully requests this Court to either affirm the decision of the Second District or to remand her cause to the circuit court with directions that either her sentence be corrected or that she be allowed to withdraw her plea.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to the Attorney General's Office, Park Trammell Building, 1313 Tampa Street, 8th Floor, Tampa, Florida 33602 by mail on this 9th day of May, 1986.

Douglas S. Connor
DOUGLAS S. CONNOR