IN THE SUPREME COURT OF FLORIDA

CASE NO. 68,616

TIMOTHY VAN HORN,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW
FROM THE DISTRICT COURT OF APPEAL OF
FLORIDA, THIRD DISTRICT

BRIEF OF PETITIONER ON THE MERITS

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INTRODUCTION

Petitioner, Timothy Van Horn, was the defendant in the trial court and the appellant in the district court of appeal. Respondent, the State of Florida, was the prosecution in the trial court and the appellee in the district court of appeal. In this brief, the parties will be referred to as they stood in the trial court. The symbol "T." designates the transcripts of proceedings held on June 28, 1984, and July 5, 1984; the symbol "S.R." designates the supplemental record reflecting the transcript of proceedings held on May 10, 1984; the symbol "R." designates the remainder of the record on appeal.

STATEMENT OF THE CASE AND FACTS

On April 11, 1984, an amended information[1] was filed which charged the defendant with burglary (aggravated by the commission of a battery) (count one), aggravated battery (count two), use of a weapon during the commission of a burglary (count three), and attempted sexual battery (count four). (R. 22-23). On May 8, 1984, the State re-amended this information to charge an additional count of aggravated battery (count five). (R. 34).

On May 10, 1984, a hearing was held before the Honorable David P. Kirwan, Judge of the Circuit Court of the Sixteenth Judicial Circuit of Florida, in and for Monroe County. (S.R. 2-13). Counsel for defendant announced that pursuant to negotia-

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[1] An earlier information had been filed on March 19, 1984. (R. 9-10).

tions with the State, the defendant would enter a plea of guilty to counts one, two, four and five (i.e., burglary, two counts of aggravated battery, and attempted sexual battery). (S.R. 3-4). The negotiations embraced the State nolle prossing count three (use of a weapon during a felony), treatment of the attempted sexual battery charge (count four) as a third-degree felony, a minimum scoring of ninety one (91) points on the burglary sentencing guidelines scoresheet, and reservation of the prosecution's ability to seek an aggravated departure from the guidelines presumptive sentence. (S.R. 3-5). The court accepted the guilty pleas, found the defendant guilty of the foregoing charges, and set the case for sentencing in June, 1984. (S.R. 7-9, 11-12). On June 28, 1984, the court, over defense objection, granted the State's motion to continue the sentencing hearing to July. (T. 4-7).

On July 5, 1984, the sentencing hearing was held. (T. 8-35). The prosecutor requested the court to utilize a recent amendment to the sentencing guidelines which pertained to the definition and mode of calculating the "primary offense". (T. 10-11). The lower court acceded to the prosecutor's request, over defense counsel's objection that the amendment, which became effective after the commission of the alleged offenses and after the defendant had entered his guilty pleas, could not be applied retroactively. (T. 15, 21, 23-25, 27). Applying the guidelines in effect at the time the alleged offenses were committed, burglary, a first-degree felony, was the primary offense and, so computed, resulted in a total score of one hundred and thirty

four (134) points, and a recommended sentencing range of five and one half to seven (5½ - 7) years' imprisonment. (R. 22, 47, 54). The lower court, by applying the amendment, treated attempted sexual battery, a third-degree felony, as the primary offense and, thereby, arrived at a total scorepoint of four hundred and two (402), which scorepoint resulted in a recommended sentencing range of twelve to seventeen (12-17) years' imprisonment. (R. 55).

The court adjudicated the defendant guilty and sentenced him to a sum of seventeen years' imprisonment. (R. 47, 49-52).

On direct appeal to the Third District Court of Appeal, the defendant challenged the trial court's application of the guidelines amendment which was not in effect at the time of the commission of the alleged offenses, as violative of the federal and state constitutional ex post facto prohibitions.

In a 2-1 decision, the Third District rejected this claim on the authority of State v. Jackson, 478 So.2d 1054 (Fla. 1985), and, in affirming the defendant's sentences, certified the following question of great public importance:

> Whether all sentencing guidelines amendments are to be considered procedural in nature so that guidelines as most recently amended shall be applied at the time of sentencing without regard to the ex post facto doctrine.

Van Horn v. State, 11 FLW 829 (Fla. 3d DCA April 8, 1986).

In his dissenting opinion, Chief Judge Alan Schwartz expressly refrained from adhering to State v. Jackson, supra, due to his conviction that the trial court's retroactive application of the guidelines amendment directly violated the federal con-

stitution's ex post facto ban:

> SCHWARTZ, Chief Judge, (dissenting).
>
> I cannot find that a change in the guidelines rules which directly results in more than doubling the time the defendant must serve in prison is a mere change in procedure which, consistent with the United States Constitution, may be retroactively applied. I therefore must dissent. I do so with the greatest reluctance in the light of my all-too-painful awareness of the fact that in State v. Jackson, 478 So.2d 1054 (Fla. 1985), the Supreme Court of Florida has held to the contrary. (Footnotes omitted). Since the common, statutory, and constitutional law of Florida is what the highest court of our state says it is, I am bound, like every other lower court judge, to follow its determinations of any such issues. (Footnote omitted). But this case is controlled by the United States Constitution which we are bound by our oaths to uphold and which is authoritatively interpreted by the Supreme Court of the United States. Applying its decisions, and even giving the great deference to the opinion of the Florida Supreme Court which it must be accorded, I feel myself required in conscience to conclude that the length of a prison sentence which is not subject to parole and which is determined by the applicable guidelines is, in the most basic sense, a substantive matter, (footnote omitted), which, under the ex post facto clause, may not be increased by an amendment adopted after the crime. (Footnote omitted). Weaver v. Graham, 450 U.S. 24, 101 S.Ct. 960, 67 L.Ed.2d 17 (1981); Kring v. Missouri, 107 U.S. 221, 2 S.Ct. 443, 27 L.Ed. 506 (1883). For the reasons stated by the Jackson minority, and by every pre-Jackson district court decision, (footnote omitted), I do not agree to the affirmance of the appellant's sentence.

Van Horn, supra, 11 FLW, 829-30 (Schwartz, C.J., dissenting).

A notice seeking invocation of this Court's discretionary review jurisdiction, based upon the district court's certified question, was timely filed on April 14, 1986; on April 21, 1986, this Court entered an order granting review.

SUMMARY OF ARGUMENT

As Chief Judge Alan Schwartz emphasized in his dissenting opinion in this case, the more than double increase in the defendant's guidelines sentence resulting from an application of an amendment which was not in effect on the date of the offenses violated the ex post facto ban. Regardless of whether the amendment is labelled "procedural" or "substantive", because its direct effect was to eliminate substantial protections which the law had afforded the defendant at the time of the offenses, its retroactive application was constitutionally barred.

ARGUMENT

THE TRIAL COURT ERRED IN UTILIZING AN AMENDMENT TO THE SENTENCING GUIDELINES WHICH WAS NOT IN EFFECT AT THE TIME OF THE COMMISSION OF THE OFFENSES, IN VIOLATION OF THE EX POST FACTO PROHIBITION OF THE FEDERAL AND STATE CONSTITUTIONS.

Under the sentencing guidelines in effect at the time the defendant committed the alleged offenses, his presumptive sentence fell in a range of 5½-7 years' imprisonment. Due to an amendment under the guidelines which took effect four days prior to the sentencing hearing, the presumptive sentence increased to the range of 12-17 years' imprisonment.[1] Applying the amendment, the trial court imposed sentences totalling 17 years' imprisonment. The Third District Court of Appeal, in a 2-1 decision, rejected the defendant's challenge to the application of the guidelines amendment as being violative of the federal and state ex post facto prohibitions, by relying upon this Court's decision in State v. Jackson, 478 So.2d 1054 (Fla. 1985). The court then

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The amendment concerned the change in the definition of "Primary offense" under Rule 3.701 d.3. of the Florida Rules of Criminal Procedure. Under the pre-amendment provision, where multiple offenses were charged, the offense with the highest statutory degree constituted the primary offense. Applying this provision, the burglary charge was the primary offense, and utilizing that offense-category, the recommended sentencing range was 5½-7 years' imprisonment. (R. 54). Under the amended provision, where multiple offenses are charged, a scoresheet for each offense is to be prepared and the scoresheet which recommends the most severe sentence range is the scoresheet to be utilized for sentencing purposes. The trial court, applying this amendment, treated the alleged attempted sexual battery offense, which was a third-degree felony, as the primary offense. (T. 21, 27; S.R. 4; R. 55). Based on this reliance on the amendment, the presumptive sentencing range increased to 12-17 years' imprisonment. (R. 55).

certified the following question:

> Whether all sentencing guidelines amendments are to be considered procedural in nature so that guidelines as most recently amended shall be applied at the time of sentencing without regard to the ex post facto doctrine.

The defendant submits this question must be answered in the negative.

It must be observed at the outset that the procedural/substantive dichotomy employed for the purpose of resolving a separation of powers issue under the state constitution is not appropriate for resolution of an ex post facto claim. While mere procedural changes do not run afoul of the ex post facto prohibition, procedural changes which injuriously affect a substantial right to which an accused was entitled as of the time of his offense do fall within the ex post facto ban. As the Supreme Court declared in Kring v. Missouri, 107 U.S. 221, 2 S.Ct. 443, 27 L.Ed. 506 (1883):

> Can the law with regard to bail, to indictments, to grand juries, to the trial jury, all be changed by state legislation after the offense committed, to the disadvantage of the prisoner, and not held to be ex post facto because it relates to procedure . . .
>
> And can any substantial right which the law gave the defendant at the time to which his guilt relates, be taken away from him by ex post facto legislation, because, in the use of a modern phrase, it is called a law of procedure? We think it cannot.

Id. 27 L.Ed., 510 (Emphasis added).

This view was re-affirmed by the Court in Weaver v. Graham, 450 U.S. 24, 29 n. 12, 31 (1981):

> Alteration of a substantial right, however, is not merely procedural, even if the statute

takes a seemingly procedural form.

* * *

> ... it is the effect, not the form, of the law that determines whether it is ex post facto. (citations and footnote omitted).

Thus, the pivotal focus for ex post facto analysis is whether the effect of the enactment, regardless of its label as procedural or substantive, impairs a substantial right given to the defendant at the time of the alleged offense.

In State v. Jackson, 478 So.2d 1054 (Fla. 1985), this Court held that the sentencing guidelines amendment which authorizes a trial judge to use the immediately next higher cell in the recommended range based on a finding of probation revocation, without reciting any "departure" reason for the penalty increase, was to be applied at the time of Jackson's resentencing. The subject matter of the amendment in Jackson clearly did not impair any substantial right of that defendant since, under the pre-amendment guidelines in effect at the time of Jackson's initial sentencing, and in full accordance with the then existing decisional law, a finding of probation revocation constituted an indisputably valid reason for departing from the guidelines.[2]

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Wholly aside from the de minimus nature of the guidelines amendment involved in Jackson, no bona fide ex post facto claim existed in that case for the very reason that Jackson's crime was committed pre-guidelines. The focal point for any ex post facto analysis is always upon the time of the offense. Jackson committed his offense and was placed on probation before any form of sentencing guidelines was in effect. Accordingly, when Jackson committed his offense, he could not have been prejudiced or surprised to his detriment by any subsequent change in the guidelines which did not result in a harsher sentence than the one, up to the statutory limits, which could have been imposed at (Cont'd)

See e.g., Stubbs v. State, 470 So.2d 768 (Fla. 1st DCA 1985); Frazier v. State, 463 So.2d 458 (Fla. 2d DCA 1985), review denied, 472 So.2d 1182 (Fla. 1985); Saunders v. State, 459 So.2d 1119 (Fla. 1st DCA 1984), review denied, 469 So.2d 750 (Fla. 1985); Carter v. State, 452 So.2d 953 (Fla. 5th DCA 1984). Thus, the guidelines amendment in Jackson simply changed the former requirement that the words "probation revocation" be recited as a departure reason, to that of allowing an automatic one-cell increase upon that very same ground.[3] The procedural change in Jackson was therefore but that; the same penalty resulted under either procedure and no substantial right was impaired.

In sharp contrast, the amendment in this case, as Chief Judge Schwartz observed in his dissent, "directly result[ed] in more than doubling the time the defendant must serve in prison". Van Horn v. State, 11 FLW 829 (Fla. 3d DCA April 8, 1986). (Schwartz, C.J., dissenting).

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the time of his crime. Indeed, Jackson was accorded the benefit of electing guidelines sentencing upon revocation of his probation. This benefit was the result of legislative largesse and was in no way constitutionally required. That Jackson was able to choose guidelines sentencing forecloses any ex post facto challenge since essential to the constitutional prohibition is the imposition upon a defendant of a retroactive enactment. See Glover v. State, 474 So.2d 886, 894 (Fla. 1st DCA 1985).

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Indeed, in light of the decisional law holding that the amendment involved in Jackson permits only a one-cell increase, and no further enhancement, based on a probation violation, the amendment was actually beneficial to all defendants, since under the pre-amendment provision, there existed no impediment to extending a departure beyond one-cell based on a probation violation. See Boldes v. State, 475 So.2d 1356 (Fla. 5th DCA 1985); Stewart v. State, 480 So.2d 1387 (Fla. 1st DCA 1986); Ludmin v. State, 480 So.2d 1389 (Fla. 1st DCA 1986); Irving v. State, 484 So.2d 78 (Fla. 2d DCA 1986); Self v. State, 11 FLW 959 (Fla. 1st DCA April 23, 1986).

At the time of the commission of the alleged offenses, the trial court could not have enhanced the presumptive $5\frac{1}{2}$-7 years guidelines range to the 12-17 years range without having established clear and convincing reasons for the penalty aggravation and without having had the State substantiate those reasons through facts proven beyond a reasonable doubt. See State v. Mischler, 11 FLW 139 (Fla. April 3, 1986).

Prior to the amendment, the defendant had a right to defend against a departure from the lower presumptive sentence by requiring compliance with these dual, clear and convincing, and proof beyond a reasonable doubt requirements, and thereafter, by securing direct appellate review of both the reasons for departure and the extent of the departure. See Albritton v. State, 476 So.2d 158 (Fla. 1985). The elimination of these substantial protections with which the pre-amendment guidelines had afforded the defendant clearly violated the ex post facto ban: it is axiomatic that any diminishment in the quantum of proof required of the State against a defendant or any nullification of a defense resulting from a retroactive application of a statute violates ex post facto. Calder v. Bull, 3 Dall. 386, 1 L.Ed. 648 (1798); Dobbert v. Florida, 432 U.S. 282, 292-293 (1977); LaFave & Scott, Criminal Law, Section 12 (1972).

Furthermore, as a result of the amendment, the defendant's opportunity to receive the lesser penalty reflected by the pre-amendment presumptive sentence was substantially reduced. By applying the amendment, the trial judge was legally required to

comply with the enhanced presumptive sentence unless clear and convincing reasons supported by proof beyond reasonable doubt existed to justify a deviation downward to the lesser penalty. Thus, the amendment imposed a burden upon the defendant of producing clear and convincing reasons in order to secure the lower penalty, which under the law prior to the amendment required no such proof. This constriction upon the defendant's opportunity to secure a lesser penalty directly achieved by the amendment, falls precisely within the constitutional ban.

In Weaver v. Graham, 450 U.S. 24, 34, 36 (1981), the Supreme Court emphasized that because the statutory reduction in gain time allowances "reduced [the petitioner's] opportunity to shorten his time in prison", the statute made "more onerous the punishment for crimes committed before its enactment" and, thus, ran "afoul of the prohibition against ex post facto laws". Similarly, in Lindsey v. Washington, 301 U.S. 397, 401-402 (1937), where the statute changed a previously discretionary, maximum 15-year penalty to a mandatory 15-year maximum penalty, the Supreme Court emphasized that "[i]t is plainly to the substantial disadvantage of petitioners to be deprived of all opportunity to receive a sentence which would give them freedom from custody and control prior to the expiration of the 15-year term". Likewise, in the present case, the effect of the amendment was to substantially reduce the defendant's opportunity to receive the lesser penalty which, under the pre-amendment law, was presumptively to be applied by the trial court.

The resultant lessening of a defendant's opportunity to

secure an earlier release, common to Weaver, supra, Lindsey, supra, and the instant case is a factor clearly absent from Dobbert v. Florida, 432 U.S. 282 (1977). The procedural change involved in Dobbert solely concerned the apportionment of responsibility between jury and judge in deciding whether the death penalty or life imprisonment is the appropriate penalty. This change did not heighten the probability of a death sentence nor did it reduce a defendant's opportunity to secure a life sentence. To the contrary, as the Supreme Court observed in Dobbert, the change was ameliorative; the subsequently enacted tripartite sentencing scheme enhanced a defendant's chances for receiving the lesser penalty of life imprisonment. In sharp contrast, here, under no circumstances could the guidelines amendment be beneficial to an accused. The amendment, which directs the use of that scoresheet which reflects the highest possible penalty, clearly increased the quantum of punishment and substantially lowered the defendant's chances for receiving a lesser sentence.

In neither Weaver nor Lindsey was the statutory maximum penalty modified. The statutory change effected in both cases solely concerned but one determinant of the punishment imposed upon the respective defendants. In Lindsey, supra, 301 U.S., 400, the Court declared that the analysis required a focus upon "the practical operation" of the statutory change. In Weaver, supra, 450 U.S., 31, 33, the Court stated that the critical inquiry was whether the law produced a penal consequence disadvantageous to the defendant.

As set forth supra, in this case, the practical operation and consequence of the guidelines amendment was manifestly disadvantageous to the defendant; a key determinant of his sentence, the presumptive guidelines range, was more than doubled by the retroactive operation of the amendment and, thereby, the defendant's opportunity for an earlier release was substantially reduced. The fact that the statutory maximum penalty remained the same was simply irrelevant. See Lindsey, supra; Weaver, supra; Lee v. State, 294 So.2d 305 (Fla. 1974); State v. Williams, 397 So.2d 663 (Fla. 1981).

In short, the defendant submits that the question certified by the district court should be answered in the negative. While a procedural change that does not injuriously affect a substantial right to which an accused was entitled as of the time of the offense is not ex post facto, such as those which occurred in Dobbert and Jackson, the contrary is true where the change does deprive him of a substantial right. Because unlike the facts of Dobbert and Jackson, substantial protections legally accorded to the defendant at the time of the offenses were materially altered to his detriment by retroactive application of the guidelines amendment, the ex post facto prohibition bars the amendment's operation in this case.

CONCLUSION

Based on the foregoing policies and arguments, petitioner requests that this Court answer the certified question in the negative and quash the majority decision of the district court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed to the Office of the Attorney General, 401 Northwest 2nd Avenue, Miami, Florida, this 16th day of May, 1986.

Beth C. Weitzner
Beth C. Weitzner
Assistant Public Defender