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

* *

BRIEF OF RESPONDENT ON THE MERITS

JIM SMITH
Attorney General
Tallahassee, Florida

NANCY C. WEAR
Assistant Attorney General
Department of Legal Affairs
401 N.W. 2nd Avenue, Suite 820
Miami, Florida 33128
(305) 377-5441

TABLE OF CONTENTS

TABLE OF CITATIONS

INTRODUCTION

Petitioner was the Defendant in the trial court and Appellant before the Third District Court of Appeal.

Respondent, the State of Florida, was the prosecution in the trial court and Appellee before the Third District.

The parties will be referred to as Petitioner and the State, respectively.

STATEMENT OF THE CASE AND FACTS

Petitioner's statement of the case and facts is acceptable.

SUMMARY OF ARGUMENT

Petitioner argues that because his presumptive guidelines sentence was longer when a scoresheet newly in effect was used at his sentencing, he should be sentenced under the procedure in effect when the offense was committed. The Third District Court of Appeals rejected that position (with a dissent).

This Court has consistently rejected Petitioner's argument and should continue to do so.

ARGUMENT

SENTENCING GUIDELINES TO BE APPLIED ARE THOSE IN EFFECT AT THE TIME OF SENTENCING.

This court continues to hold that the sentencing guidelines to be applied are those in effect on the date of sentencing. State v. Jackson, 478 So.2d 1054 (Fla. 1985).

In his brief Petitioner asserts, as he did in the district court, that by adhering to this rule the U.S. Constitution's prohibition against ex post facto laws is offended. That position has been rejected repeatedly and consistently by this Court. State v. Jackson, supra, citing Dobbert v. Florida, 432 U.S. 282 (1977). "The presumptive sentence established by the guidelines does not change the statutory limits of the sentence imposed," Jackson declared, adopting the position the State had urged in that case.

Nothing new has been added by the case sub judice to the arguments previously made in the series of cases decided since Jackson. State v. Arnett, 11 FLW 214 (Fla. May 8, 1986), State v. Beggs, 11 FLW 214 (Fla. May 8, 1986).

Petitioner relies on the dissent in Van Horn v. State, 11 FLW 829 (Fla. 3d DCA April 8, 1986), in urging that the

issue be revisited yet again. An examination of that dissent indicates that Chief Judge Alan R. Schartz was troubled by the sentence that Petitioner actually received under the modified guidelines. Jackson, it will be recalled, was refused the opportunity to select the guidelines and was also sentenced to a term longer than the guidelines range would have permitted without stating clear and convincing reasons therefor. Petitioner Van Horn, on the other hand, was sentenced within the guidelines but on a day shortly after a change in scoring took effect. Thus, the net effect of the holding in State v. Jackson, supra, may have been more advantageous to Jackson personally that it has been to Van Horn personally. That, the dissent and Petitioner agree, is what makes the rule in State v. Jackson ex post facto.

This Court has repeatedly announced its determination that modifications in the sentencing guidelines procedure are procedural, not requiring the application of the ex post facto doctrine. State v. Jackson, supra; Dobbert v. Florida, supra; State v. Arnett, supra; State v. Beggs, supra.

Moreover, an examination of the facts recited in district court opinions in some of the cases that have followed Jackson through this Court reveals that defendants other than Petitioner have been disadvantaged by this rule.

In Beggs v. State, 473 So.2d 9 (Fla. 1st DCA 1985), the defendant complained that the modified scoresheet used for him at his August, 1984, sentencing was different from the one in effect at the time of the offense to which he (like Petitioner Van Horn) had entered a plea. Like Petitioner, Beggs was sentenced within the guidelines then in effect. In its recent opinion this Court adhered to Jackson in reversing the district court. State v. Beggs, supra. See also Dougherty v. State, 474 So.2d 11 (Fla. 1st DCA 1985), quashed in State v. Dougherty, 11 FLW 215 (Fla. May 1, 1986).

Another example showing that Petitioner is by no means alone in feeling "disadvantaged" by the Jackson rule is the district court opinion in Arnett v. State, 471 So.2d 548 (Fla. 4th DCA 1985). Arnett's February, 1984, probation was revoked in August, 1984, after the revision that allowed a one-cell upward departure for a probation violation without written reasons therefor. Arnett was sentenced to 24 months in state prison (12-30 months was one cell above his scorepoint, no-state-prison-sanction, cell). Arnett thus went from no prison to two years. Compare that "disadvantage" to the one suffered by this Petitioner. Some might say that an enhancement from no prison to two years is more like a quantum leap than an arithmetic increase. This Court nevertheless quashed the district court's opinion and remanded the matter, applying and citing Jackson. State v. Arnett, supra.

There has been a desirable and reliable consistency in the cases decided on this issue that is -- unnecessarily, in the State's view -- once again before this Court. The certified question must be answered in the affirmative.

CONCLUSION

This Court has declined to apply ex post facto analysis to the merely procedural changes that have occurred from time to time since the sentencing guidelines were first implemented. No ground having been shown for a departure from that consistent position, the certified question must be answered in the affirmative.

Respectfully submitted,

JIM SMITH
Attorney General

NANCY C. WEAR
Assistant Attorney General
Department of Legal Affairs
401 N.W. 2nd Avenue (Suite 820)
Miami, Florida 33128
(305) 377-5441

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing BRIEF OF RESPONDENT ON THE MERITS was furnished by mail to BETH C. WEITZNER, Assistant Public Defender, 1351 N.W. 12th Street, Miami, Florida 33125, on this 6th day of June, 1986.

NANCY C. WEAR
Assistant Attorney General

NCW/pa