IN THE SUPREME COURT OF FLORIDA

SUPREME COURT CASE NO: 71,718

THE STATE OF FLORIDA,

Petitioner,

vs.

PATRICK MCGRIFF,

Respondent.

****

ON PETITION FOR DISCRETIONARY REVIEW

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BRIEF OF PETITIONER ON THE MERITS

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TABLE OF CONTENTS

TABLE OF CITATIONS

OTHER AUTHORITIES

TABLE OF CITATIONS CON'TD

OTHER AUTHORITIES

INTRODUCTION

Petitioner, the State of Florida was the prosecution at the trial court level and the Appellee in the District Court of Appeal of Florida, Third District. Respondent, **Patrick McGriff** was the defendant at the trial level and the appellant in the district court. All emphasis has been supplied unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

On October 4, 1983, the State filed a two-count Information charging Appellant with one count of strong-armed robbery, and one count of aggravated battery in violation of sections §812.13, and 784.045 (1)(a) Florida Statutes (1983). (R.1-2A) After a jury trial, Appellant was convicted and adjudicated guilty of robbery and battery on April 19, 1984. (R.24)

Although the recommended prison term under the sentencing guidelines was 7 to 9 years, the trial court provided two reasons for exceeding the guidelines and sentenced the defendant to fifteen (15) years for the robbery conviction and one year for the battery conviction, the statutory maximum for each offense. See §§775.082 (3)(C) and (4)(a), Fla.Stat. (1985). (R.24) The sentences were to run concurrently. The State then requested that the defendant be declared an habitual offender and sentenced under section §775.084, Florida Statutes (1985). (R.40) The trial court granted the State's request and increased the sentence to thirty (30) years. (R.40) The defendant appealed. In McGriff v. State, 497 So.2d 1296 (Fla. 3d DCA 1986), rev. den., 506 So.2d 1042 (Fla. 1987) the Court affirmed the convictions but vacated the sentences finding that the trial court failed to comply with the procedures established in section 775.084. (R.40)

On remand, after conducting the proper investigation and hearing, thd trial court once again found the defendant to be an habitual offender, entered an Order with two reasons for departure (escalating pattern of violence and defendant's use of excessive force) and resentenced him to thirty (30) years. (R. 30-35).

On appeal for the second time, the district court found an escalating pattern of violence is a valid reason for departure from the guidelines. (R. 41) As to the second reason the Court held:

> Excessive force is generally a valid reason, Harris v. State, 482 So.2d 548 (Fla. 4th DCA 1986); Sabb v. State, 479 So.2d 845 (Fla. 1st DCA 1985); however, in the instant case, it is invalid because victim injury had already been calculated on the guidelines scoresheet. Mathis v. State, 515 So.2d 214, 216 (Fla. 1987); Hansbrough v. State, 509 So.2d 1081, 1088 (Fla. 1987). Although the trial judge stated in her order that each reason by itself was sufficient to justify the departure sentence, we are not convinced beyond a reasonable doubt that the sentence would be the same absent consideration of the invalid reason. See Griffis v. State, 509 So.2d 1104 (Fla. 1987). Albritton v. State, 476 So.2d 158 (Fla. 1985).

(R. 41)

The court then discussed the applicability of Section 921.001(5), Floria Statutes, as amended by Chapter 87-110, section 2 and concluded that the amendment as applied to this case, would violate the ex post facto clause. (R. 41-42) The Court reversed and remanded the cause for resentencing to permit the trial judge to reevaluate the factors supporting the departure sentence and sua sponte certified the following question as one of great public importance:

> WHETHER THAT PORTION OF CHAPTER 87-110, LAWS OF FLORIDA, WHICH AMENDS SECTION 921.001(5), FLORIDA STATUTES, IS APPLICABLE TO APPELLATE REVIEW OF SENTENCES IMPOSED FOR OFFENSES WHICH WERE COMMITTED PRIOR TO JULY 1, 1987.

(R. 42) The State timely filed a Notice to Invoke Discretionary Jurisdiction. This appeal ensues.

POINT INVOLVED ON APPEAL

WHETHER THAT PORTION OF CHAPTER 87-110, LAWS OF FLORIDA, WHICH AMENDS SECTION 921.001(5), FLORIDA STATUTES, IS APPLICABLE TO APPELLATE REVIEW OF SENTENCES IMPOSED FOR OFFENSES WHICH WERE COMMITTED PRIOR TO JULY 1, 1987?

SUMMARY OF THE ARGUMENT

Application of Chapter 87-110, section 2 may constitutionally be applied to sentences imposed for crimes committed prior to the amendment's effective date without violating the ex post facto clauses of the Florida and federal constitutions.

Although the amendment is retrospective, the amendment does not change the legal consequences of the defendant's acts completed before its effective date to his substantial disadvantage. Unlike in Booker v. State, 514 So.2d 1079 (Fla. 1987) the Appellant is not foreclosed from appellate review of validity of the reasons given by the trial court in support of the enhanced sentence. The amendment merely eliminates the remand to the trial court to reevaluate the remaining valid reasons for departure. An implicit ameliorative aspect of the amendment is that Rule 3.800 has always provided and will continue to provide a procedure by which the trial court may, sua sponte or upon the defendant's request, reconsider the sentence. This alternative procedure for relief counterbalances any "substantial disadvantage" which may result under Chapter 87-110, section 2. Thus, when combined with a person's rights under Rule 3.800, the amendment is on the whole ameliorative and merely a procedural change which alters the method employed in determining how a departure sentence might be sustained

without remanding the matter back to the trial judge to reevaluate whether he would still depart based on the remaining valid reasons given. Consequently, no ex post facto violation will result.

ARGUMENT

CHAPTER 87-110, SECTION 2, LAWS OF FLORIDA WHICH AMENDS SECTION 921.001(5), FLORIDA STATUTES IS APPLICABLE TO APPELLATE REVIEW OF SENTENCES IMPOSED FOR OFFENSES WHICH WERE COMITTED PRIOR TO JULY 1, 1987.

The sole question for review is whether application of this amendment may constitutionally be applied to sentences imposed for crimes committed prior to the amendment's effective date.

The relevant provision under review from Chapter 87-110, Section 2 provides:

> [W]hen multiple reasons exist to support a departure from a guidelines sentence, the departure shall be upheld when at least one circumstance or factor justifies the departure regardless of the presence of other circumstances or factors found not to justify departure.

Article I, section 10 of the Florida Constitution provides:

> No bill of attainder, ex post facto law or law impairing the obligation of contracts shall be imposed.

Similarly, Article I of the United States Constitution provides that neither Congress nor any state shall pass any

"ex post facto law." See Art. 1, §9, cl 3, ; Art. 1, §10, cl 1.

In Miller v. Florida , 482 U.S. , 107 S.Ct. , 96 L.Ed.2d 351 (1987), the United States Supreme Court reaffirmed a two part test for determining whether a criminal law violates the ex post facto clause. The court announced:

> As was stated in Weaver, to fall within the ex post facto prohibition, two critical elements must be present: first, the law "must be retrospective, that is, it must apply to events occurring before its enactment"; and second, "it must disadvantage the offender affected by it." Id., at 29, 67 L.Ed.2d 17, 101 S.Ct. 960.

Application of this two-part analysis to the amended guidelines legislation in the instant case reveals that Section 2 of Chapter 87-110 is retrospective, that is , it applies to events occurring before its enactment. In the instant case the Appellant committed the offenses of strong-armed robbery and battery prior to the enactment of this amendment. Furthermore, Appellant was sentenced twice prior to July 1, 1987, the effective date of the amendment. [1] However, in McGriff v. State, No.87-572 ___ So.2d ___, (Fla. 3d DCA Apr. 26, 1988) the Third District reversed the

[1] Appellant was most recently resentenced on January 27, 1987. (R. 32-35)

Appellant's sentence and remanded the cause to the trial court for resentencing to permit the trial judge to reevaluate the factors supporting the departure sentence. (R. 42) Thus, Appellant will once again be resentenced after the effective date of this amendment for offenses which were committed on October 4, 1983.

However, even though the amendment is retrospective, the amendment does not change the legal consequences of the defendant's acts completed before its effective date to his disadvantage, or otherwise violate the constitutional prohibition against ex post facto laws. In Felts v. State, ____ So.2d ____. 13 F.L.W. 205, 207 (Fla. 1st DCA Jan. 14, 1988) (pending rehearing) the Court reasoned:

> [T]he 1987 amendment does not preclude appellate review of the validity of the reasons given by the trial judge for departure, but merely clarifies the law with respect to the legality of a departure sentence which is based upon both valid and invalid reasons, and thus presents a very different situation from that addressed in Booker.
>
> Under Rule of Criminal Procedure 3.800, the trial court may reduce or modify a legal sentence imposed by it within 60 days after receipt of an appellate court mandate affirming the judgment or sentence or an order dismissing an appeal, or within 60 days of disposition by a higher court. This rule provides a mechanism by which a trial judge may reconsider a sentence which may have become "unreasonable" because some of the reasons given for departure have been found to be invalid.

As was recognized in Felts, under section 921.001, as it existed both before and after July 1, 1987, a defendant may have his sentence reduced by operation of Rule 3.800. See Miller v. State, 515 So.2d 392 (Fla. 2d DCA 1987); Dupont v. State, 514 So.2d 1159 (Fla. 2d DCA 1987). Prior to the effective date of Chapter 87-110, under Albritton v. State, 476 So.2d 158 (Fla. 1985) the appellate court could mandate reconsideration of a sentence which was based on both valid and invalid reasons.

In concluding that Chapter 87-110 does not disadvantage defendants whose offenses were committed prior to its effective date the court in Felts explained:

> The effect of Chapter 87-110 is to eliminate the remand to the trial judge, which had been required by Albritton when both valid and invalid reasons for departure were articulated, for reconsideration of the sentence in light of the appellate court's rulings on the validity of the reasons given for departure. Because Rule 3.800 has always provided a mechanism by which the trial judge may, sua sponte or upon the defendant's request, reconsider the sentence, application of Chapter 87-110 to appeals pending after its effective date does not have an substantive detrimental effect on defendants whose offenses were committed prior to its effective date.

Felts, 13 F.L.W. at 207.

In the instant case, the Third Ditrict reached the opposite result through the following reasoning:

> Application of Chapter 87-110, section 2, to crimes committed prior to July 1, 1987, violates these provisions by preventing judicial review of a sentence which departs from the guidelines where there is at least one valid reason amongst multiple reasons given for the departure. This restriction is clearly disadvantageous to the offender who, prior to the amendment, might be eligible for a review of his departure sentence by the trial court where both valid and invalid reasons are given to support the sentence and it is not clear whether the sentence would be the same in the absence of the invalid reason. Albritton, 476 So.2d at 158.

(R. 42)

The State submits the change in the sentencing guidelines law at issue here is merely a procedural clarification which does not disadvantage the Respondent.

As a practical matter, Petitioner is unaware of a single case where a trial judge changed his mind about imposing a departure sentence as a result of an appellate court's finding that one or more of the reasons given for the departure was invalid. Presumably, this is precisely why Chapter 87-110, section 2 was enacted by the legislature. The legislative history of the bill does not address the issues of whether the legislature intended this amendment to be dis-

advantageous to the offender, or a substantive or procedural change in the law, or merely a clarification of what the statutory law has always been. [2] See Felts, 13 F.L.W. at 206.

In the absence of any clearly discernible legislative intent, the court should apply certain well established rules of statutory construction and judicial restraint. First, in determining the constitutionality of a legislative enactment, the courts are under an obligation to give it a construction which will uphold it rather than invalidate it, if there is any reasonable basis for so doing, and an act of the legislature should not be struck down if there is any reasonable theory upon which it can be upheld. See Felts v. State, 13 F.L.W. at 206. The Felts court set forth the basic principles the Court should follow in determining whether Chapter 87-110 is unconstitutional as follows:

> Every reasonable doubt should be resolved in favor of the constitutionality of a legislative act, since the presumption of constitutionality continues until the contrary is proven beyond all reasonable doubt. If a statute which is claimed to be unconstitutional is susceptible of two interpretations, one of which would lead to a finding of unconstitutionality and other of validity, the

[2] The legislative history does reveal by implication that the Legislature passed this amendment despite the fact that this Court rejected the Sentencing Guidelines Commission's Recommendation to adopt this standard. See Senate Staff Analysis And Ecomonic Impact Statement, Senate Bill 35, 347, 894 and 923 at 2 (April 22, 1987).

> court must adopt the construction which will support the validity of the statute. In testing the constutionality of a statute, the court should take into consideration the whole of the act, and may consider its history, the evil to be corrected or the object to be obtained, and the intention of the lawmaking body. When a subject lies within the police power of the state, debatable questions as to the reasonableness of the exercise of that power are not for the courts but for the legislature to determine. (Footnotes omitted)

Felts, 13 F.L.W. at 206.

With these principles in mind, the State maintains that application of this amendment to crimes committed before its effective date does not violate the ex post facto provisions of the Florida and federal constitutions in light of the "evil to be corrected, . . . the object to be obtained and the intention of the lawmaking body."

The change in the sentencing laws in this case is unlike the more onerous change in Miller. Miller was adversely affected by a change in the guidelines law which increased by 20% the number of points assigned to sexual offenses. Miller 96 L.Ed.2d at 358. As a result of the point increase, Miller's total point score jumped from a presumptive range of 3 1/2 to 4 1/2 years to a presumptive range of 5 1/2 to 7 years. Id. At Miller's sentencing hearing the trial judge applied the new guidelines range and imposed a seven year

term of imprisonment. Id. In reversing this Court's decision that the trial court may sentence a defendant pursuant to the guidelines in effect at the time of sentencing the high court held Miller was substantially disadvantaged because

> even if the revised guidelines law did not "technically . . . increase . . . the punishment annexed to [petitioner's] crime," Lindsey, supra, at 401, 81 L.Ed.2d 1182, 57 S.,Ct. 797, it foreclosed his ability to challenge the imposition of a sentence longer than his presumptive sentence undr the old law.

Miller. 96 L.Ed.2d 351-352.

As to the matter sub judice, Miller is inapposite. Chapter 87-110, section 2 does not result in a substantial disadvantage to the Appellant. The Appellant is not foreclosed in his ability to challenge the validity of his departure sentence. The only effect of Chapter 87-110, section 2, is to eliminate the remand to the trial judge, which had been required by Albritton when both valid and invalid reasons for departurte were articulated. See Felts, 13 F.L.W. at 207. Due to the backlog of appeals and remands which are a result of the sentencing guidelines laws and the Albritton standard of review, the State submits the legislature has enacted this amendment in the hopes of promoting judicial economy and to alleviate the trial courts burdensome caseload with regard to resentencing matters.

Moreover, in the instant case, the two reasons for exceeding the guidelines were 1) the defendant's escalating pattern of violence and 2) the defendant's use of excessive force. (R. 41). These reasons are closely related. They both address the violence used by the Appellant. The first reason justifies an enhanced punishment based on the Appellant's progression from non-violent to violent crimes or a progression of increasingly violent crimes. The second reason, that is, excessive use of force, is generally a valid reason but not in the instant case because victim injury has already been calculated on the guidelines scoresheet. (R. 41) Where a trial judge has already sentenced a defendant twice to the same enhanced sentence, and where the trial judge states that each reason by itself is sufficient to justify the departure sentence, if defies logic and reason for the appellate court to conclude that it is not convinced beyond a reasonable doubt that the sentence would be the same absent consideration of the invalid reason. (See R. 41).

In Booker v. State, 514 So.2d 1079 (Fla. 1987) this Court held that the 1986 amendment restricting appellate review of the extent of departure sentences violated the ex post facto provisions of the Federal and Florida Constitutions. Under Chapter 86-237, a person validly sentenced outside the guidelines may not have his departure sentence reviewed or reduced even though by definition, as set forth in Albritton, virtually no reasonable judge would

have imposed such a sentence. This amendment clearly disadvantaged Booker since it restricted his previous right to appellate review of his sentence.

In contrast, the amendment at issue here presents a very different situation from that addressed in Booker. First, Appellant is not foreclosed from appellate review of the validity of the reasons given by the trial court in support of the enhanced sentence. Chapter 87-110 merely eliminates the remand to the trial judge. Second, Rule 3.800 has always provided and will continue to provide a mechanism by which the trial court may, sua sponte or upon the defendant's request, reconsider the sentence. Although this ameliorative feature of the charge is not explicitly included in Chapter 87-110, it is a relevant factor that should be considered in determining whether the amendment "substantially disadvantages" Appellant and similarly situated defendants. This alternative procedure for relief counterbalances any "substantial disadvantage" which may result under Chapter 87-110.

Finally, even if the amendment at issue operates to the defendant's substantial disadvantage, the ex post facto prohibition does not restrict "legislative control of remedies and modes of procedure which do not affect matters of substance." See Dobbert v. Florida, 432 U.S. 282, 293, 97 S.Ct. 2290, 53 L.Ed.2d 344. No ex post facto violation occurs if

the change in the law is merely procedural and does "not increase the punishment, nor change the ingredients of the offense or the ultimate facts necessary to establish guilt." Hopt v. Utah, 110 U.S. 574, 590, 4 S.Ct. 202, 28 L.Ed. 262 (1884). Notwithstanding this court's footnote in Griffis v. State, 509 So.2d 1104 (Fla. 1987), the court has not held that Chapter 87-110 is a substantive change in the law which may be applied only to cases in which the offense was committed after the effective date of the amendment. In Booker, this Court did not explicitly reach the issue of whether the amendment to the guidelines which restricted appellate review of a person sentenced outside the guidelines was a procedural or substantive change in the law. However, the Court did note that if Chapter 86-273 was applied retrospectively, a defendant would lose his ability to challenge a departure sentence based on an abuse of discretion by the sentencing judge. See Booker v. State, 514 So.2d at 1084, FN 3. Unlike the situation in Booker, Chapter 87-110 simply alters the method employed in determining how a departure sentence might be sustained based on at least one reason justifying departure without remanding the matter back to the trial judge to reevaluate whether he would still depart based on the one reason given. Instead of remanding the case back to the trial judge after appellate review of the validity of the reasons given for departure, the departure sentence shall be upheld when at least one factor justifies the departure regardless of the presence of factors

found not to justify departure. See Chapter 87-110, section 2. When combined with a person's rights under Rule 3.800, the amendment is on the whole ameliorative and merely a procedural change similar to that in Dobbert. Unlike the amendment in Miller, the amendment at issue here was not intended to and did not increase the "quantum of punishment" for Petitioner's crime.

CONCLUSION

Based on the foregoing arguments and authorities, Petitioner submits that application of Chapter 87-110 to Respondent does not violate the ex post facto clause of either the United States Constitution or the the Constitution of the State of Florida and therefore should be applied in the case sub judice.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **BRIEF OF PETITIONER** was furnished by mail to **ROBERT KALTER**, 330 Biscayne Blvd., Penthouse, Miami, Florida 33132 on this 21 st day of June, 1988.

IVY R. GINSBERG
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