

IN THE SUPREME COURT OF FLORIDA

THOMAS ALVIN CONNELL,

Petitioner,

v.

CASE NO. 71,777

JERRY WADE,

Respondent.

FILED  
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MAY 11 1988

CLERK SUPREME COURT

Deputy Clerk

BRIEF OF THE RESPONDENT

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PRELIMINARY STATEMENT

THOMAS ALVIN CONNELL will be referred to as the "petitioner" in this brief. The record on appeal consists of one (1) initial record on appeal and two (2) supplements to the record proper. These documents have not been clearly marked in sequence in accordance with standard practice. As such, respondent will cite the initial record which was certified by the connotation "R" followed by the corresponding record page, the supplemental record with the July 27, 1987, certification date will be cited as "SR/1" followed by the corresponding page number, and the supplemental record with the September 29, 1987, certification date will be referred to as "SR/2" followed by the corresponding page number.

STATEMENT OF THE CASE

The petitioner was charged with one count of sexual battery upon a child older than 11 years of age, but younger than 18, and one count of lewd assault. (R 1) After the jury trial which resulted in the petitioner's finding of guilt as charged, the petitioner sought and obtained a new trial. (R 12, SR/2 - 5) Thereafter, the state appealed the granting of the Motion for New Trial. Whereas the instant record is deficient as to this matter, the implications of the instant record suggests that the state appeal from the granting of the motion for new trial avail. (R 12, SR/1 - 75) See also State v. Connell, 478 So.2d 1176 (Fla. 2nd DCA 1985). The petitioner was apparently retried and found guilty as charged a second time and the petitioner appealed from this judgment and sentence. The District Court affirmed the judgment and reversed the sentence upon the grounds that the trial court's reasons for departure were improper. (R 4 - 5) The state sought discretionary review of the District Court's reversal of the sentence in this Court and this Court denied review. Upon remand, the petitioner was sentenced within the guidelines range. (R 17) The petitioner subsequently appealed the sentence exclusively on an ex post facto claim and in an opinion authored by the Honorable James Lehan, the District Court of Appeal, Second District, affirmed the sentence of the trial court and held that application of the guidelines rules which were applicable at the time of sentencing did not violate the ex post facto clause of the United States Constitution since

the presumptive sentence was no greater than the maximum lawful sentence which was applicable at the time the offense was committed.

The petitioner filed a petition for writ of habeas corpus in this Honorable Court and this Court entered an order treating that petition as a petition seeking discretionary review and accepted the petitioner's cause for review. It is from this posture that the instant case comes before this Honorable Court.

STATEMENT OF THE FACTS

The critical fact in the instant case is that the petitioner was sentenced under the guidelines in effect at the time of his election. (R 8) The petitioner's counsel readily acknowledged below that he had not previously elected guidelines prior to the amendment of the guidelines as they had previously existed although the crimes for which the petitioner was being sentenced occurred prior to the effective date of the guidelines. (R 12, 13) The petitioner's alleged reason for being able to retroactively elect defunct guideline rules was that the state had caused delay by appealing the trial court's granting of the petitioner's Motion for New Trial, that the guidelines rules had changed during the lapse of time, and that the guidelines rules at the time of election provided a greater presumptive sentence. (R 12)

SUMMARY OF THE ARGUMENT

Since the petitioner did not have an adverse amendment to the law imposed upon him, but rather, elected to have an alternative other than what the consequences were at the time the crime was committed, there was no ex post facto violation.



ARGUMENT

ISSUE I

WHETHER THE TRIAL COURT'S REFUSAL TO ALLOW THE PETITIONER TO RETROACTIVELY ELECT DEFUNCT GUIDELINES RULES RESULTS IN AN EX POST FACTO VIOLATION.

The petitioner's counsel overtly conceded that prior to February 13, 1986, there had never been an election to be sentenced under the sentencing guidelines for the instant preguidelines offense. (SR/1 - 12) Yet, on appeal to the District Court of Appeals, Second District, the petitioner asserts that a change in the presumptive sentence results in an ex post facto violation although there was no objection or argument below on such grounds. Such failure, respondent submits, is a procedural default of such an issue. See Williams v. State, 414 So.2d 509 (Fla. 1982) citing Castor v. State, 365 So.2d 701 (Fla. 1978), for the application of the contemporaneous objection rule to an ex post facto claim. As such, the sentence rests on an adequate and independent state ground which would be respected by the United States Supreme Court should this court apply procedural default to the instant ex post facto claim in accordance with its precedent in Williams, supra. See Wainwright v. Sykes, 433 U.S. 72 (1977).

As for the merits of the petitioner's claim concerning the amendments which occurred to the sentencing guidelines as a result of this Court's decision in The Florida Bar: Amendments to the Rules of Criminal Procedure, 451 So.2d 824 (Fla. 1984), which changed the scoring grid under category 2 of the sentencing


guidelines, the petitioner ignores the fundamental point that the ex post facto clause seeks to protect; that being, applying a disadvantageous aspect of a change in the law to a crime committed before the law took effect. State v. Williams, 397 So.2d 663 (Fla. 1981) and Weaver v. Graham, 450 U.S. 24 (1981). This concept might be offended had petitioner elected guidelines and more onerous set of guidelines which came in to effect after the election were applied to petitioner. Sub judice, the petitioner had made no election to the previous guidelines. (R 12) Rather, the petitioner was fully entitled to the consequences of the law as it existed at the time his offense was committed and elected the alternative provided by the guidelines sentencing scheme. Accordingly, it was not a retroactively applied change in the law which resulted in any adverse consequences to the petitioner, but rather, it was the petitioner's own actions which were the causation of any adverse consequences to the petitioner. Since the ex post facto clause, and the constitution as a whole, was primarily concerned with limiting government's oppression of individual liberties; it cannot be reasonably applied to protect individuals from themselves since this is completely inapposite of the concept of individual freedom, liberty, and the sanctity of individual choice of actions and beliefs which is the primary values sought to be protected by the constitution.

CONCLUSION

Whereas, the issues raised on appeal were not raised at the trial level, it is procedurally defaulted and should not be entertained on appeal. Furthermore, the issue is without merit for the reasons previously mentioned. As such, the sentence of the trial court and the judgment of the District Court of Appeal affirming that sentence should be affirmed by this Honorable Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to Thomas Alvin Connell, Hendry Correctional Institution, Route 2, Box 13-A mb#360, Immokalee, Florida 33934, this 9th day of May, 1988.

  
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OF COUNSEL FOR RESPONDENT.