OA 10-3-88

IN THE SUPREME COURT OF FLORIDA

ALPHONSO P. SMITH,

Appellant,

v. CASE NO. 72,862

STATE OF FLORIDA,

Appellee.

_____/

REPLY BRIEF OF APPELLANT

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REPLY BRIEF OF APPELLANT

PRELIMINARY STATEMENT

The appellant will refer to the State of Florida, represented in this court by the Attorney General, as "the State" and will refer to the State Attorney of the Second Judicial Circuit as "the amicus."

ARGUMENT

The brief of the amicus demonstrates the confusion spawned by overreliance on doctrinaire labels. This case simply can not be decided by calling a statute or rule procedural or substantive. Nor are federal guidelines decisions, including the expected ruling by the United States Supreme Court, decisive of the issues before this court.

The uniqueness of Florida's sentencing guidelines is that they were adopted separately by both the court and the legislature. Unlike the federal guidelines, moreover, the Florida guidelines commission did not enact or promulgate rules for use by trial courts.

Undoubtedly those responsible for developing the Florida guidelines were aware of the constitutionally different functions of the legislature and the courts, and were familiar with proper delegation of legislative authority and separation of powers.

The prior opinions of this court serve notice that there is no bright line distinction between the proper domain of the legislature vis-a-vis the court when criminal law and procedure are concerned. E.g. In Re Rules of Criminal Procedure, 272 So.2d 65 (Fla. 1972). Some areas at the extremes of the spectrum can be easily identified. The legislature properly controls the right to parole eligibility,[1] to appeal,[2] and determines the

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[1] Owens v. State, 316 So.2d 537 (Fla. 1975).
(Footnote Continued)

maximum and minimum punishments.[3] But the imposition of sentence, exercising judicial discretion, is a function of the sentencing judge.[4] Within those extremes are the the grey areas, which include the determination of how to structure sentences that would be uniform without being arbitrarily so.

Amicus assails the proposition that the guidelines are predominately procedural, relying to a large extent on Miller v. Florida, 96 L.Ed.2d 351 (1987). The issue in Miller was whether changes in the guidelines enacted after Miller's crime could be applied to his sentence. The focus was on the effect of the changes, to determine whether there was a violation of the Ex Post Facto Clauses in Article I, Sections 9 or 10 of the U.S. Constitution. The Supreme Court found that the changes had a substantive effect on Miller's sentence by increasing the guideline range for his crime and depriving him of the right to appeal the increased sentence. "[T]he change at issue appears to have little about it that could be deemed procedural." 96 L.Ed.2d at 362. The Supreme Court did not rule that the entire guidelines were a substantive rule, only that changes which had a disadvantageous effect were substantive and could not be applied retrospectively; " a change in the law that alters a substantial

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(Footnote Continued)

[2]Booker v. State, 514 So.2d 1079 (Fla. 1987).

[3]Dorminey v. State, 314 So.2d 134 (Fla. 1975).

[4]Booker, supra, note 2.

right can be ex post facto even if the statute takes a seemingly procedural form." Ibid.

Significantly, one of the components changed to Miller's detriment was loss of the opportunity to appeal, a substantive right which was created in Section 921.001(5) by the legislature.

Miller is not conclusive. The issue remains for this court to decide whether it possessed the power to enact the guidelines as a rule of procedure. Because the guidelines are tools for controlling the exercise of judicial sentencing discretion, the guidelines should be upheld as properly promulgated under this court's authority to make rules for the practice and procedure in all courts.[5]

Anticipating questions of substance versus procedure and separation of powers, the architects of sentence reform provided that the guidelines themselves would be approved by both the legislature and the court.

The amicus says no authority supports appellant's proposition that even if the court lacked authority to promulgate the rules, legislative adoption cured the deficiency. Florida

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[5]Amicus raises the point that Chapter 88-131 Laws of Florida amends Section 921.001(5) by requiring the guidelines commission to submit recommended changes to the legislature and not the court. Appellant need not address legislative changes to the guidelines not yet adopted. It must be stressed that legislative changes to the rules of procedure that were not later ratified by the court would raise a serious constitutional question, because the legislature is powerless to enact procedural rules. In Re Clarification of Rules of Practice and Procedure, 281 So.2d 204 (Fla. 1973).

law has long recognized that the legislature can adopt by reference the provisions of federal law or regulations in existence at the time of the enactment. Adoue v. State, 408 So.2d 567 (Fla. 1982); Florida Industrial Commission v. State, 155 Fla. 772, 21 So.2d 599 (1945); Brazil v. Division of Administration, 347 So.2d 755 (Fla. 1st DCA 1977), overruled on other grounds by LaPointe Outdoor Advertising v. Florida Department of Transportation, 398 So.2d 1370 (Fla. 1981). The legislature can likewise adopt by reference other statutes or regulations of this state or its agencies. Overstreet v. Blum, 227 So.2d 197 (Fla. 1969); Palm Beach County National Utility Co. v. Palm Beach County Health Department, 390 So.2d 115 (Fla. 4th DCA 1980).

These decisions validate appellant's argument that legislative enactment of the guidelines rules previously adopted by the court cured whatever improper delegation might have occurred.

The connection between unlawful delegation and incorporation by reference was explained in Adoue, supra, 408 So.2d at 570 as follows:

> The delegation doctrine is grounded on the constitutional maxim that the legislature has the sole authority and responsibility to make the laws. State v. Atlantic Coast Line Railway Co., 56 Fla. 617, 47 So. 969 (1908). Unless the constitution otherwise authorizes, the legislature cannot delegate this responsibility to any other person or body. State v. Welch, 279 So.2d 11 (Fla. 1973). The legislature may, as it has in the past, adopt the regulatory

> and statutory standards of the federal government, but these standards must be in existence at the time of the adoption. (Emphasis added).

Under the rationale of Adoue the legislature could not delegate the authority to make law to any other person or body, unless authorized by the constitution. Comparing that restriction with Article V, Section 2 of the Constitution, the court similarly was constrained by its exclusive (and presumably non-delegable) function of promulgating rules of practice and procedure. Two solutions are suggested to the dilemma of who should enact the guidelines; one is to find that the legislature could delegate to the court the authority to adopt the rules because they fell within the exclusive authority of the court. In that view, a delegation takes place but it is lawful because the court is exclusively empowered to adopt procedural rules. It is also a lawful delegation because of the reasons well expressed in the state's brief.

A second solution is for the legislature to ask the court to promulgate rules and then, through incorporation by reference, enact those rules into law.

An example of the second option is found in Askew v. Cross Key Waterways, 372 So.2d 913 (Fla. 1978). The court decided that the legislature had failed to provide sufficient standards in Section 380.05 Florida Statutes (1975) for exercise of power by the Division for State Planning and the Administration Commission in designating by rule areas of critical state concern. Concluding its opinion, the court noted it was not impairing the

ability of government to protect vital resources and facilities: Future accomplishment of those goals could be done either by advance legislative identification of the area, or "through [legislative] ratification of administratively developed recommendations . . .." Id. at 925.

Combining the theories of incorporation by reference and the teaching of Cross Keys Waterways, the guidelines emerge as a valid legislative act, regardless of whether there was a previous unlawful delegation. By Chapter 84-328 the legislature incorporated by reference the then existing guidelines, thereby ratifying the rule and overcoming whatever shortcomings might have existed by court promulgation.

By making the incorporation by reference argument appellant does not concede any lack of authority by the court to enact the guidelines as rules of procedure. The dual-adoption mechanism was added to ensure survival of the guidelines. Consequently, appellant relies on legislative adoption as alternative support for validity of the guidelines as they existed on June 23, 1988, the date appellant was resentenced.

Another argument raised by amicus is the purported unconstitutional make-up of the guidelines commission. Judges, so the argument goes, should not have served on the commission for reasons expressed in some of the court decisions on federal guidelines applying federal constitutional principles of separation of powers.

First, the court here is not bound by federal law when interpreting Article II, Section 3 of the Florida Constitution. Askew v. Cross Key Waterways, supra. Second, there is a significant difference between the adoption processes of federal and Florida guidelines. It must be remembered that the federal guidelines, promulgated solely by the guidelines commission, took effect automatically 180 days after their submission to Congress. In Florida the guidelines were affirmatively adopted by two branches of government, the Supreme Court and the legislature.[6]

Amicus was wrong in asserting that there is not a "dimes worth of difference" between affirmative and passive legislative response. The United States Supreme Court ruled in INS v. Chadha, 462 US 919 (1983) that a one house veto of administrative action amounted to an invalid legislative act because of non-compliance with Article I, Sections 1 and 7 of the United States Constitution. The court said in a footnote that:

> The legislative steps outlined in Article I are not empty formalities; they were

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[6]Neither the court nor the legislature was slavishly bound to accept the product of the Florida Guidelines Commission. The Supreme Court adopted some of the commission's recommendations, rejected some, and modified others. The legislature also rejected some rules adopted by the court and the court withdrew those changes. See e.g. The Florida Bar: Amendment to Rules of Criminal Procedure (3.701, 3.988 - Sentencing Guidelines). 451 So.2d 824 (Fla. 1984) (adopting recommendations); 468 So.2d 220 (Fla. 1985) (adopting recommendations); 482 So.2d 311 (Fla. 1985) (adopting and rejecting recommendations); 599 So.2d 1088 (Fla. 1987) (adopting, modifying and rejecting): Chapter 86-273 Section II, Laws of Florida (adopting revision); Chapter 87-110, Section I (adopting revision in part).

> designed to assure that both Houses of Congress and the President participate in the exercise of law-making authority. . . . [T]he steps required by Article I, Sections 1, 7, make certain that there is an opportunity for deliberation and debate. To allow Congress to evade the strictures of the Constitution and in effect enact Executive proposals into law by mere silence cannot be squared with Article I. (Emphasis added)
> Id. at 958, note 23.

Enactment of a law by congress requires affirmative action by both houses, presentment to the president, and his option to veto; mere silence by Congress is not equivalent to enactment of a law. The federal sentencing guidelines, therefore, became effective without being constitutionally enacted by Congress. Instead they were promulgated and made binding on the courts entirely through the vote of the Sentencing Guidelines Commission. For that reason the federal courts could, with justification, examine all of the powers, duties, composition, and functions of the guidelines commission with a view toward its constitutionality. If it is ultimately determined by the United States Supreme Court that the federal guidelines commission was composed in violation of federal separation of powers, the guidelines themselves may fall as the enactment of that flawed commission.

The same cannot be said of Florida's guidelines. Amicus sees that there are state and federal guidelines, that each system controls sentencing discretion, and that they had their inception through a commission on which judges served. The momentum of the federal decisions caused amicus to make excessive

analogy to the federal guidelines and overshoot the borders of the Florida scheme.

While it is true that sentencing guidelines exist in both Florida and federal systems, their existence per se is not illegal. And comparing similarities in the guidelines themselves does not address the fundamental question whether their enactments were constitutional. Even if judges should not (or constitutionally could not) serve as members of the Florida Guidelines Commission, amicus does not explain how service on that advisory commission renders invalid the subsequent enactment of rules adopted by the Supreme Court which are also voted into law by the legislature. The independent acts of the judicial and legislative branches in adopting the guidelines purified them from any asserted taint emanating from service by judges on the commission. Congress on the other hand did not insulate the federal guidelines from commission action by enacting them into law; Florida did. For that reason alone, all the federal decisions relied on by amicus are inapposit.

Carried to a logical extension, the position advanced by amicus would prompt inquiry into all the sources of legislation before enactment. Presumably, if any agency or board recommending legislation were staffed by an unqualified member, the ensuing legislation would be void. That, of course, is not the law. In Cliento v. State, 377 So.2d 663 (Fla. 1979) it was argued that the legislature acted without a sufficient factual predicate when classifying methaqualone as a controlled

substance. This contention was rejected; the court said "where a factual predicate is necessary to the validity of an enactment, it is to be presumed that the necessary facts were before the legislature." Id. at 665. Furthermore, "the constitution does not limit the legislature to particular methods for acquiring knowledge." Ibid.

With the principles of Cliento in mind, the fallacy of the argument by amicus is apparent. The questions of what inquiry the legislature made or from whom it received its information prior to adopting the guidelines are irrelevant. In fact, the court would likely violate separation of powers itself by going behind the legislative enactment to make those inquiries. What amicus fails to realize is that beginning July 1, 1984 the guidelines were law. No connection was shown by amicus, or by the trial judge, linking the asserted unconstitutional composition of the guidelines commission with the passage of the guidelines as enacted in Chapter 84-328 and subsequent adoptions.

Even if the point is that Section 921.001 was unconstitutional in part because judges were to serve on the guidelines commission, the result is the same. Flaws in the commission become moot insofar as the validity of other portions of the statute were concerned once the guidelines were adopted by rule and statute.

The final phase of amicus' assault on the guidelines is whether service on the guidelines commission by some judges renders all judges unfit to rule on issues arising under the

guidelines. The Supreme Court of Florida promulgates rules of procedure and also adjudicates cases arising under those rules. That has never been thought to disqualify the justices of this court from ruling fairly on issues related to the rules. One of the cases cited by amicus, Beynard v. State, 322 So.2d 473 (Fla. 1975) is a decision finding the court's own rule unconstitutional. If judges can interpret and apply rules they adopted they certainly are not disabled from sentencing functions just because some judges were members of a sentencing advisory commission.

Amicus suggested in conclusion that the trial judge's ruling should be upheld because Article X, Section 9 of the Florida Constitution says that repeal or amendment of a criminal statute shall not affect prosecution or punishment for any crime previously committed. Amicus admits this issue was never raised in any of the prior proceedings in this case.

The court should not consider this point because an amicus is precluded from raising issues not raised by the parties. Acton v. Ft. Lauderdale Hospital, 418 So.2d 1099 (Fla. 1st DCA 1982). Neither party has raised the applicability of Article X, Section 9.

Even assuming that this issue is properly before the court, it should not control the court's disposition. The appellant was originally sentenced in 1984. Apparently the state acquiesced to a guidelines election at that time. An appeal was taken to the district court on the departure sentence. The state does not

assert it made any attack on the legality of the sentence in that proceeding. As late as June 23, 1988, when appellant appeared for resentencing, no mention was made of the issue by either counsel arguing for the amicus.

Article X, Section 9 is in the nature of an ex post facto provision. Like other constitutional rights it may be waivable. If appellant elected to waive his ex post facto and Article X, Section 9 rights, and the state acquiesced in the waiver of the latter constitutional provision, the state would be estopped from asserting a contrary position in this court. See State v. Evans, 388 So.2d 1104 (Fla. 4th DCA 1980); State v. Schmitz, 450 So.2d 1254 (Fla. 3d DCA 1984): cf., Hoover v. State, 13 FLW 537, case no. 71,291 (Fla. September 8, 1988). (state and defense can acquiesce to a conviction not supported by the evidence).

In any event, the issue injected by amicus does not require affirmance. It simply begs the question to say that a criminal statute was changed. A major controversy in the case is whether sentencing guidelines are substantive law enacted by statute or procedural law enacted by rule.

The authorities cited by amicus are not on point. The case of Castle v. State, 330 So.2d 10 (Fla. 1976) held that laws which reduced the statutory maximum sentence could not be applied to crimes committed before their effective date. In this case the statutory maximum or minimum penalties were not affected. Washington v. Dowling, 92 Fla. 601, 109 So. 588

(1926) is distinguishable also. Changing death from hanging to electrocution changed the actual punishment.

None of the decisions relied on by amicus under Article X, Section 9 are controlling. The issue is a distraction from the question on which the trial judge ruled. This court's jurisdiction was invoked and accepted to settle that question of great public importance.

Appellant asks the court to find Section 921.001 and rule 3.701 constitutional and reverse the order appealed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by hand delivery to Honorable William N. Meggs, State Attorney, Leon County Courthouse, Tallahassee, Florida; Mr. Raymond L. Marky, Assistant State Attorney, Leon County Courthouse, Tallahassee, Florida; Mr. Richard E. Doran, Assistant Attorney General, The Capitol, Tallahassee, Florida; and a copy has been mailed to appellant, Mr. Alphonso P. Smith, this 23rd day of September, 1988.

MICHAEL J. MINERVA