

IN THE SUPREME COURT OF FLORIDA

*This brief
allowed in
Case # 72864
Gilmore v St.*

GREG EDWARD CUSIC,)
)
 Petitioner,)
)
 v.)
)
 STATE OF FLORIDA,)
)
 Respondent.)
 _____)

CASE NO. 71,268

FILED
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SEP 14 1988
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ON DISCRETIONARY REVIEW FROM THE
DISTRICT COURT OF APPEAL
SECOND DISTRICT, FLORIDA

ANSWER BRIEF OF RESPONDENT

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PRELIMINARY STATEMENT

Petitioner, Greg Edward Cusic, was the defendant before the trial court and Respondent, the State of Florida, was the Prosecution. The parties will be referred to by their proper names or as they appeared in the trial court.

SUMMARY OF THE ARGUMENT

The Second District correctly held petitioner was not entitled to the benefits of the decision in Whitehead v. State, infra. The Whitehead decision was not the type of significant change in law so as to call into question the validity of a judgment or sentence as contemplated in Witt v. State, infra. Petitioner did not raise this issue on direct appeal and his sentence was final when Whitehead was decided. Changes in the sentencing guidelines' case law, such as those which disapprove reasons for departure previously considered valid, should not be retroactively applied.

ARGUMENT

ISSUE

IS THE PETITIONER PERMITTED TO ATTACK COLLATERALLY THE LEGALITY OF HIS GUIDELINE SENTENCE BY RULE 3.850/3.800(a) ON THE BASIS THAT THE SOLE REASON FOR DEPARTURE, HIS STATUS AS AN HABITUAL OFFENDER, ALTHOUGH VALID UNDER A LOWER COURT DECISION AT THE TIME IMPOSED, IS INVALID UNDER A SUBSEQUENTLY ISSUED SUPREME COURT DECISION ENUNCIATING A DIFFERENT CONSTRUCTION OF THE SENTENCING STATUES AND SENTENCING GUIDELINES RULE? (As stated by Petitioner/Defendant)

The defendant, Greg Cusic, was convicted and sentenced in 1985. The sentencing guidelines scoresheet called for a presumptive sentence of 5 1/2 - 7 years; but the trial court sentenced Cusic to a term of 8 years, finding the defendant to be an habitual offender. On direct appeal, the defendant did not challenge the imposition of the departure sentence as an habitual offender and Cusic's conviction and sentence was affirmed by the Second District Court on June 25, 1986. Cusic v. State, 490 So.2d 950 (Fla. 2d DCA 1986).

On October 30, 1986, this Court issued its opinion in Whitehead v. State, 498 So.2d 863 (Fla. 1986) finding that a defendant's habitual offender status is not an adequate reason to depart from the sentencing guidelines. In 1987, Cusic filed a "Motion to Correct An Illegal Sentence" in the trial court, pursuant to Rule 3.800(a), Florida Rules of Criminal Procedure, and he claimed an entitlement to the benefit of Whitehead.

The trial court denied Cusic's motion on the grounds that Cusic failed to present this claim on direct appeal and he was therefore barred from presenting this claim via a post-conviction motion. The Second District affirmed the denial of Cusic's post-conviction motion on the authority of its earlier decision in McCuiston v. State, 507 So.2d 1185 (Fla. 2d DCA 1987). Cusic v. State, 512 So.2d 309 (Fla. 2d DCA 1987). Therefore, resolution of this case is controlled by the outcome of McCuiston v. State, Fla. S.Ct. #70,706, which is currently pending before this Court.

The State maintains that McCuiston v. State, 507 So.2d 1185 (Fla. 2d DCA 1987) was correctly decided by the Second District Court. In McCuiston, the Second District considered whether the decision in Whitehead v. State, 498 So.2d 863 (Fla. 1986), holding that the habitual felony offender statute is not an exemption to the sentencing guidelines, nor can it be used as a grounds for departing from the guidelines, should be applied retroactively. The Second District was faced with the issue of whether Whitehead was a sufficient change of law so as to support a challenge to a conviction or sentence that was valid when made. The inquiry was answered in the negative in reliance on this Court's decision of Witt v. State, 387 So.2d 922 (Fla. 1980). In Witt, it was held that an alleged change of law would not be considered on 3.850 unless the change came from this Court or the United States Supreme Court, was constitutional in nature and constituted a development of fundamental significance. Otherwise, the change may be viewed as an

evolutionary refinement in the law not requiring application to cases which are already final.

Although Whitehead is a decision emanating from this Court, it is not one of a constitutional nature. It has long been recognized that the length of sentences is a matter within the prerogative of the legislature. Rummel v. Estelle, 445 U.S. 263, 1000 S.Ct. 1133, 63 L.Ed.2d 382 (1980). The exercise of that prerogative will not reach constitutional proportions absent the violation of a constitutional provision. See, Solem v. Helm, 463 U.S. 277, 103 S.Ct. 3001, 77 L.Ed.2d 637 (1983), wherein the United States Supreme Court found a life sentence without parole eligibility for a third minor felony to be cruel and unusual punishment.

Rather than a development of fundamental significance, Whitehead represents an evolutionary development of changes in the law in the sentencing guidelines arena. The habitual offender statute was enacted and in use long before the sentencing guidelines became law. The District Courts interpreted the guidelines in harmony with other sentencing statutes, including the habitual offender statute. Thus, from October 1, 1983 until October 30, 1986, the two statutes were read in pari materia. Not until the Whitehead decision were the statutes given a different construction. This is the type of change contemplated by this Court in Witt when it was said:

Emergent rights in these categories, or the retraction of former rights of this genre, do not compel an abridgment of the finality of judgments, to allow them that impact would, we are convinced, destroy the stability of the law, render punishments uncertain and therefore ineffectual, and burden the judicial machinery of our state, physically and intellectually, beyond any tolerable limit.

(387 So.2d at 929-930)

These principles are especially applicable in the sentencing guidelines area.

For almost three years, the trial and district courts of this State were using the habitual offender statute as a valid reason for imposing sentences in excess of the recommended range. See, e.g. Brady v. State, 457 So.2d 544 (Fla. 2d DCA 1984), Smith v. State, 462 So.2d 995 (Fla. 5th DCA 1984). Is the judiciary now to be burdened with post-conviction motions from all persons treated as habitual offenders during that period? And what of other refinements in the guidelines? Can every person who has been sentenced in excess of the guidelines since October 1983 now have his sentence reviewed via a post-conviction where one or more of the reasons for departure has since been found to be invalid?

The United States Supreme Court has held that retroactive application of judicial decisions is not constitutionally required. Solem v. Stumes, 465 U.S. 638, 104 S.Ct. 1338, 79 L.Ed 2d 579 (1984). The essential considerations in determining whether a decision should be applied retroactively are the purpose to be served by the new standard, the extent of reliance on the old

standard and the effect on the administration of justice if the decision is applied retroactively. Allen v. Hardy, ___ U.S. ___, 106 S.Ct. ___, 92 L.Ed.2d 199 (1986); Stovall v. Denno, 388 U.S. 293, 87 S.Ct. 1967, 18 L.Ed.2d 199 (1967); Witt v. State, 387 So.2d 922 (Fla. 1980), cert. denied, 449 U.S. 1067, 101 S.Ct. 796, 66 L.Ed.2d 612 (1980). Application of these principles to the case before this Court demonstrates that the invalidation of a previously valid reason for departure from the guidelines should not be applied retroactively to support post-conviction relief.

The disapproval of a previously valid ground for departure is nothing more than an evolutionary refinement in the criminal law.

Accordingly, pursuant to Witt, changes in the guidelines case law, such as those which disapprove reasons for departure previously considered valid, should not be retroactively applied. Ardley v. State, 491 So.2d 1259 (Fla. 1st DCA 1986). Furthermore, guideline - related errors which could be raised on appeal may not, in the majority of cases, serve as a basis for post-conviction relief. See, e.g., Rowe v. State, 496 So.2d 857 (Fla. 2d DCA 1986), but note, State v. Whitfield, 487 So.2d 1045 (Fla. 1986) in which this Court amended Rule 3.800(a), Florida Rules of Criminal Procedure, to permit a court to correct at any time "an incorrect calculation made by it in a sentencing

guidelines scoresheet." Under the circumstances of this case, the trial court did not err in denying Cusic's post-conviction Rule 3.800 Motion.¹

¹ Both McCuiston and the defendant in Hall v. State, 511 So.2d 1038 (Fla. 1st DCA 1987), Review Pending, State v. Hall, No. 71,078, sought post-conviction relief via Rule 3.850, Fla.R.Crim.P. However, a defendant's Petition is not subject to dismissal because an improper remedy is sought. Article V, Section 2(a), Florida Constitution.

CONCLUSION

The district court's opinion holding that Whitehead is not to be applied retroactively should be affirmed.

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. Mail to Greg Edward Cusic, #226410, Apalachee Correctional Institution, P. O. Box 699W N-45, Sneads, Florida 32460 this 18th day of March, 1988.

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