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IN THE SUPREME COURT OF FLORIDA

JAMES WATTS,

:

Petitioner,

vs ■

■

Case No. 74,117

STATE OF FLORIDA,

Respondent.

FILED
CLERK OF THE SUPREME COURT

JUL 5 1989

CLERK, SUPREME COURT
Deputy Clerk

DISCRETIONARY REVIEW OF DECISION OF THE
DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

Respondent

INITIAL BRIEF OF PETITIONER ON THE MERITS

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TENTH JUDICIAL CIRCUIT
FLORIDA BAR NO. 0143265

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PRELIMINARY STATEMENT

Respondents, JAMES WATTS and Steven Smith, were the defendants and Appellants in the matter of Watts v. State, 14 FLW 1014 (Fla. 2d DCA April 21, 1989), wherein the Second District Court of Appeals certified conflict with the Fifth District Court of Appeals. Respondents would accept the Statement of the Case and Facts presented by the Petitioner. (Brief of Petitioner pp. 2-41

SUMMARY OF THE ARGUMENT

The 1985 amendment to section 958.14, Florida Statutes (1983) provides that the maximum sentence which can be imposed upon a revocation of Youthful Offender Community Control is six years. The language of the statute is clear and unambiguous on its' should be given its' stated effect.

The intent of the legislature was to limit the maximum sentence as interpreted by the First, Second, and Third District Courts of Appeal. The timing of the amendment coupled with established rules of statutory construction support no other result. Had the legislature wished a result different from that applied by the Second District, the statute could have been amended. It has not been amended. Further, the rule of lenity requires that Petitioner's construction of section 958.14 be rejected.

Respondent are entitled to have the provisions of the amendment apply to them. The act giving rise to Respondent's being subject to the penalty provisions of section 958.14 arose after the effective date of the amendment. Further, since no ex post facto violation will occur, Respondents are entitled to have the law in effect at the time of their sentencing to be applied. The decision of the Second District should be affirmed.

ARGUMENT

ISSUE I

WHETHER THE TRIAL COURT ERRED IN SENTENCING THE DEFENDANT TO A TERM OF IMPRISONMENT IN EXCESS OF SIX YEARS UPON A REVOCATION OF COMMUNITY CONTROL IMPOSED PURSUANT TO SECTION 958.14, FLORIDA'S YOUTHFUL OFFENDER ACT?

Respondents submits that the Second District, in answering the above question in the affirmative, did so appropriately.

Section 958.14, Florida Statutes (1983) initially permitted the court, upon a revocation of youthful offender community control, to disregard the earlier classification of the defendant as a youthful offender and impose any sentence it might have imposed originally. In 1985, the statute was amended to provide:

Violation of probation or community control program.

A violation or alleged violation of probation or the terms of a community control program shall subject the youthful offender to the provisions of section 948.06(1). However, no youthful offender shall be committed to the custody of the department for such viol ——— for a period longer than 6 years or for a period longer than the maximum sentence for the offense for which he was found ailty, whichever is less, with credit for time served while incarcerated.

Section 958.14, Florida Statutes (1987). (Emphasis denotes amendment to statute).

The Second District held that the amendment applies in the instant case and the maximum sentence which may be imposed upon revocation is six years. Petitioner argues that such a result is contrary to legislative intent and the decisions of the First, Second, and Third District Courts are incorrect. This argument does not withstand analysis.

First, the clear, unequivocal language of the statute prohibits the result urged by Petitioner. A basic rule of statutory construction is that the words used should be given their plain and ordinary meaning. See Graham v. State, 362 So.2d 924 (Fla. 1978). The language of 958.14 is clear: "...No youthful offender shall be committed to the custody of the department for such violation for a period longer than six years or for a period longer than the maximum sentence for the offense for which he was found guilty, whichever is less..." When given their plain meaning, the words support the Second District's conclusion that six years is the maximum sentence which may be imposed at a revocation of Youthful Offender Community Control. Further, any inquiry into legislative intent may only begin when the statute is ambiguous on its' face. See State v. Egan, 287 So.2d 1, 4 (Fla. 1973). To attempt to discern legislative intent where the language is clear and unambiguous is unnecessary and futile. See Streeter v. Sullivan, 509 So.2d 268 (Fla. 1987). Respondent submits that the language of section 958.14, Florida Statutes (1983) is clear and there is no ambiguity on the face of the statute--as such. Thus, the appropriate sentence upon a revocation of Youthful

Offender Community Control is a maximum of six years, as the Second District ruled.

Even should this court conclude that further inquiry into the intent of the legislature in amending section 958.14, Florida Statutes (1983) is necessary, the identical result is reached.

The legislature amended section 958.14, Florida Statutes (1983) shortly after the decisions of the First and Fourth Districts in Brooks v. State, 461 So.2d 995 (Fla. 1st DCA 1984) and Clem v. State, 462 So.2d 1134 (Fla. 4th DCA 1984). As appropriately noted by the court in Watson v. State, 528 So.2d 101, 102 (Fla. 1st DCA 1988):

In view of this action, the only logical conclusion is that the legislature intended to change the case law interpretation of section 958.14, or in any event to change the law, so that once the circuit court has given a defendant youthful offender status and has sentenced him as a youthful offender, it must continue that status and only resentence the defendant as a youthful offender for a violation of the probation or community control portion of his youthful offender sentence. A youthful offender's sentence after revocation of probation or community control is therefore limited to a maximum of six years less credit for time served. To assume that the legislature did not intend a change in the law would be to assume it intended to enact a nullity. The language of section 958.14, as amended, relating specifically to resentencing of youthful offenders after violation of probation or community control, should prevail over the preexisting general provisions of section 948.06(1) relating to any violation of probation or community control by anyone.

It is further presumed that when the legislature amends a statute, it intends to accord the statute a meaning different from that

accorded it before the amendment. See Seddon v. Harpster, 403 So.2d 409 (Fla. 1981) and Reino v. State, 352 So.2d 853, 861 (Fla. 1977) (citation omitted). To apply the construction urged by Petitioner is to act in direct contravention to the established rules of statutory construction. Is it to, as noted in Watson, assume that the legislature intended to enact a nullity. Clearly, the fact that the amendment to section 958.14 occurred after contrary interpretation by the courts establishes that the legislature was aware of the application of the sentence provisions of section 958.14 and consciously and deliberately determined that they should be changed.

Permitting the court to sentence a defendant to a period of incarceration of more than six years upon a revocation is also in contravention to the express intent of the Youthful Offender Act. The purpose of the Youthful Offender Act is "to improve the chances of correction and successful return to the community of youthful offenders by providing them with vocational, educational, counseling, or public service opportunities and by preventing their association with older and more experienced criminals during the times of their confinement...". § 958.021, Fla. Stat. (1988). As stated by this court in Allen v. State, 526 So.2d 69, 70 (Fla. 1988), the purposes of the Youthful Offender Act is to provide a sentencing alternative that is more stringent than the juvenile system and less so than the adult. In Allen, this court refused to permit the imposition of consecutive sentences for multiple felonies which would result in an incarcerative period of more than

six years. To permit a sentence in excess of six years upon revocation of youthful offender community control is analogous to the question presented in Allen, supra. In Reams v. State, 528 So.2d 558 (Fla. 1st DCA 1988), the First District held that the court may not impose a sentence in excess of six years after revocation. Justice Ervin, in a specially concurring opinion, noted that the result urged by Petitioner would be contrary to Allen and that the sole case construing section 948.14 as urged by Petitioner, Franklin v. State, 528 So.2d 558 (Fla. 5th DCA 1988) approved in part, 14 FLW 281 (Fla. June 15, 1989), would not survive under analysis with this court's prior ruling.

Further, had the legislature intended to allow the courts to sentence youthful offenders in excess of the six year cap in contravention of the rulings in Buckle v. State, 528 So.2d 1285 (Fla. 2d DCA 1988), Watson, supra; Reams, supra; Hall v. State, 536 So.2d 268 (Fla. 3d DCA 1988); State v. Miles, 536 So.2d 263 (Fla. 3d DCA 1988) review pending, case number 73,841, Dixon v. State, 14 FLW 965 (Fla. 3d DCA 1989 opinion filed April 18, 1989) and the instant case, the legislature could have amended the statute to reflect that desire. The legislature is presumed to know the law and how it is being interpreted. Failure to further amend section 958.14 indicates the intent and desire of the legislature is being met by the ruling of the First, Second, and Third District Courts limiting the sentence to a six year maximum sentence upon revocation of youthful offender community control.

Petitioner has also chosen to ignore section 775.021, Florida Statutes (1988) which provides that when the language of a statute is susceptible of differing constructions, the statute shall be construed most favorably to the accused. Although it is Respondents position that the language of section 958.14 is clear and not susceptible to differing constructions, the rule of lenity requires that the construction Petitioner urges this court to accept be rejected. Allowing the sentencing court to disregard a prior designation as a youthful offender and sentence the defendant at a revocation proceeding to any sentence which might have been imposed originally is unquestionably a more severe and thus less favorable construction of the statute.

The rationale of the Fifth District in Franklin is simply wrong. The court, after discussing the double jeopardy challenge to the sentence in that case, 526 So.2d at 160-63, addressed section 958.14 in somewhat offhand manner:

Although the Youthful Offender Act was amended in 1985 to provide that no youthful offender shall be committed to the department upon a violation of probation for a period longer than six years or the statutory maximum, whichever is less, the amendment does not require a court to reclassify a defendant as a youthful offender after a violation. Accordingly, section 948.06, Florida Statutes (1987) may still be applied when the court determines that the defendant should no longer be classified as a youthful offender, allowing the court to sentence a defendant, after revocation to any term which could have been originally imposed without reference to the act.

Id. at 163 (citation omitted).

But this is not what the statute says. Rather, it

specifically provides that a "youthful offender" who violates probation or community control shall be subject to section 948.06, Florida Statutes (1987), and that no "youthful offender" shall be sentenced "for such violation for a period longer than 6 years... ." § 958.14, Fla. Stat. (1987). To accept the Fifth District's construction, one would have to presume that the legislature used "youthful offender" to mean one thing in the first sentence of the statute, and another thing in the second sentence: clearly, the "youthful offender" to whom reference is made in the first sentence is one who is before the court on alleged violation of probation or community control and not one who has been "reclassified" as a youthful offender prior to sentencing upon revocation, yet the Fifth District's interpretation is that the "youthful offender" to whom reference is made in the second sentence of the statute is only one who has been "reclassified." There is nothing in the statute that admits of such a distinction, and, if the legislature had intended "youthful offender" to mean something different in the second sentence, it easily could have provided that the six-year limit applied only when the offender was reclassified as a youthful offender. The legislature pointedly did not make such a distinction, and the controlling rule is that "[t]he legislature is presumed to know the meaning of the words it utilizes," Reino, supra, and the courts, "in construing a statute, may not invade the province of the legislature and add words which change the plain meaning of the statute." Metropolitan Dade County v. Brides, 402 So.2d 411, 414 (Fla. 1981) (citation omitted).

The State's attempt to breathe vitality into the Franklin holding by reference to the federal youthful offender statute, (Brief of Petitioner at A26-29) is of no assistance to its case. While this court has noted that the Florida statute is "patterned" after the federal statute (and the Alabama youthful offender act as well) , Allen v. State, 526 So.2d 69, 70 (Fla. 1988), there is nothing in the provisions of the federal statute cited in the State's brief which parallels the flat limitation imposed by section 958.14. See Brief of Petitioner at A26-29. To the contrary, it appears that the current federal statutes are virtually identical to the pre-1985 Florida statute in their adoption of general probation-revocation provisions as part of a youthful offender sentencing scheme. See 18 U.S.C. § 5023(a), §3653. While it is certainly true that Florida statutes which are patterned after federal enactments may properly be construed by reference to such enactments and federal decisional law, e.g., Moore v. State, 452 So.2d 559, 562 (Fla. 1984), "[t]his rule is, or course, not binding and is subordinate to the cardinal principle that legislative intent is the polestar of statutory construction." Openheimer & Co., Inc. v. Young, 456 So.2d 1175, 1178 (Fla. 1984) (citation omitted) . Thus, the current contrast between--and the former congruity of--the Florida and federal statutes serves only to prove the correctness of the decision below. The Florida legislature, in first adopting the youthful offender statute, intended to authorize any lawful sentence upon community control revocation, and it thereafter departed from the federal model,

intending to place a six year limit on sentences.

The question of what impact this Court's rulings in Poore v. State, 531 So.2d 161 (Fla. 1988) and the recent decision of this Court approving the double jeopardy provision of Franklin have on this decision must also be addressed.

In Poore the defendant was classified as a youthful offender and served two and a half years incarceration as part of a "true split sentence." Poore at 164. This Court addressed only the question of whether or not double jeopardy barred the imposition of a new sentence on revocation of probation and if that sentence could exceed that originally imposed. This Court held that in the case of a true split sentence only the remainder of the sentence originally imposed be imposed at revocation. This Court ruled that in the four other recognized sentencing alternatives, any sentence which may have originally been imposed subject to guidelines was appropriate at revocation. This Court did not, however, address the issue presented in this case as it did not arise in Poore because the trial court in Poore had always imposed a sentence within the six year limitation period dictated by section 948.14. Section 948.14 was not discussed.

Further, section 948.14 was not discussed by this Court in Franklin, in which the issue was present, but not certified to this Court. While this holding applies to sentences as imposed in the instant case, probationary split sentences, when looking to the face of this court's decision, Respondents must proceed from the assumption that this Court chose, in its discretion, to refrain

addressing any issue other than that certified by the district court in Franklin. See Freund v. State, 520 So.2d 556, 557 N.2 (Fla. 1988). Respondents respectfully suggest that the provision of section 958.14 place an additional limitation upon the court a resentencing. Further, the sentence imposed in Franklin was not in excess of the guidelines, as in the case of Respondents.

Franklin, as decided by the Court thus stands for no more than does Poore, and as the court in Dixon, 14 FLW at 966 concluded:

Poore stands for the proposition that double jeopardy does not forbid the imposition of a longer period of incarceration than that entered in the original sentence when a defendant violates probation in a probationary split sentence.

Nowhere in Poore did the Supreme Court hold that the amended section 958.14 permits a court to "reclassify" a youthful offender as an adult offender upon a probation or community control violation. We decline to find that the Supreme Court held thus by implication or inference. While it is true that Poore concerned a youthful offender who was resentenced outside the confine of the amended section 958.14, that fact was never placed at issue in that case as it has been in the case before us. Consequently, we do not view Poore as authority for the State's proposition. In fact, it is inconceivable that the Supreme Court held thus by implication or reference. While it is true that Poore concerned a youthful offender who was resentenced outside the confines of the amended section 958.14 that fact was never placed at issue in that case as it has been in the case before us. Consequently, we do not view Poore as authority for the State's proposition.

Petitioner argues that both Respondents are not entitled to claim benefit under the 1985 amendment because the substantive,

original law violations occurred prior to the amendment. (Brief of Petitioner pp.7-8). In Buckle, supra, the Second District held that the 1985 amendment applies to revocation proceedings where the original offense was committed before the effective date of the statute because it is the violation of probation occurring after the effective date of the 1985 amendment because it is the violation which subjects them to the penalties of section 958.14. See also Brown v. State, 492 So.2d 822 (Fla. 2d DCA 1986).

There is further support for Respondents position that they are entitled to the benefit of the 1985 amendment. In Jackson v. State, 478 So.2d 1054 (Fla. 1985). Jackson held that the trial court must sentence a defendant to the guidelines in effect at the time of sentencing. The United State's Supreme Court in Miller v. Florida, 482 U.S. ____, 96 L.Ed.2d 357, 107 S.Ct. ____ (1987) modified Jackson when its' application would result in a violation of the ex post facto clause of Article I of the United States Constitution. Ex post facto violations occur when the law is retrospective and the offender is disadvantaged. If no ex post facto violation has occurred the policy of Jackson holding that the law in effect at sentencing applies.

Applying the 1985 amendment to the instant case does not violate the ex post facto clause. Therefore, the rule of Jackson must apply. The 1985 amendment applies to Respondents and they are entitled to its' considerations at sentencing.

ISSUE II

THE TRIAL COURT ERRED IN IMPOSING A SENTENCE WHICH EXCEEDED THE GUIDELINES FOLLOWING APPELLANT'S REVOCATION OF COMMUNITY CONTROL.

This Court in Franklin v. State, 14 FLW 281 [case number 72,484] (Fla. 1989 opinion filed June 15, 1989), and Lambert v. State, 14 FLW 281 [case number 71,8901 (Fla. 1989 opinion filed June 15, 1989)], held that upon a revocation of probation the trial court is limited in the sentence that it may impose to the original guidelines sentence and the original, allowed for one-cell bump.

Should this court determine that the court should "de-classify" Respondents from their youthful offender status, the court is bound at sentencing by the ruling in Franklin.

Respondent Watts recommended guidelines disposition was four years (Watts R64). Respondent Smith's recommended guidelines sentence of three years (Smith R13). Under the ruling of this court in Franklin, the departure sentences of ten years must be struck and resentencing within the guidelines is required.

CONCLUSION

In light of the foregoing reasons, argument, and authorities, Respondent respectfully asks this Honorable Court to uphold the decision of the Second District Court of Appeal and remand the case sub iudice for the imposition of sentence consistent with that decision.

APPENDIX

ITEM

ITEM NO.

DCA opinion filed April 21, 1989,
in the case of James Watts case number
88-1404

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