

No Reg Case

IN THE SUPREME COURT OF FLORIDA

CASE NO. 67,165

THE STATE OF FLORIDA,

Petitioner,

vs.

JULIAN TAFT,

Respondent.

FILED
SID J. WHITE
DEC 23 1985
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Chief Deputy Clerk

ON PETITION FOR DISCRETIONARY REVIEW

INITIAL BRIEF OF PETITIONER ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner was the Appellee in the court below and the prosecution in the trial court. Respondent was the Appellant in the court below and the defendant in the trial court. In this brief the parties will be referred to as they appear before this Honorable Court. All emphasis in this brief is supplied by Petitioner unless otherwise indicated. A copy of the district court opinion is attached to this brief and designated (Appendix I).

The following symbol will be used:

"R" Record on Appeal.

STATEMENT OF THE CASE AND FACTS

Respondent was charged by information, with lewd assault on a child (R-22). The crimes were alleged to have occurred on May 21, 1984 (R-22,23). Respondent pled no contest to the charges (R-2), and on October 10, 1984, Respondent was sentenced, pursuant to the amended guidelines which became effective on July 1, 1984 (R-1-16).

Under the guidelines which were in effect at the time Respondent's offenses, Respondent would have been subject to a sentence of as much as one year of incarceration. Pursuant to the amended guidelines; those in effect at the time Respondent was sentenced, the trial court imposed a thirty month term of incarceration (R3,10).

Respondent moved to correct the aforesaid sentence, and to be sentenced according to the guidelines in effect at the time of his offense (R-1,10,11). The trial court denied Respondent's Motion to Correct Sentence (R-16).

Respondent brought an appeal based upon the denial of his motion to correct his sentence. The Fourth District Court of Appeal vacated the sentence and remanded this case to the trial court for resentencing pursuant to the guidelines in effect as of the date of the offenses committed by Respondent Taft v. State, 468 So.2d 472 (Fla. 4th DCA 1985).

Petitioner sought to invoke the discretionary jurisdiction of this Court, and this Court granted said jurisdiction in an order entered November 13, 1985.

POINT INVOLVED

WHETHER RESPONDENT, WHOSE OFFENSES WERE COMMITTED PRIOR TO JULY 1, 1984, WHO PLED NO CONTEST AND WAS SENTENCED AFTER JULY 1, 1984, WAS PROPERLY SENTENCED PURSUANT TO THE AMENDED GUIDELINES, AND THIS WAS NOT VIOLATIVE OF EX POST FACTO PRINCIPLES?

SUMMARY OF ARGUMENT

This Court's decision in State v. Jackson, ___ So.2d ___, 10 S.L.W. 564 (Fla. op. filed October 17, 1985) is dispositive of the instant case. Application of the amended sentencing guidelines to all sentencings after July 1, 1984, does not violate ex post facto principles because the amendments were merely procedural. Thus, the trial court's sentence was correct and the Court of Appeal erred in reversing it.

ARGUMENT

RESPONDENT, WHOSE OFFENSES WERE
COMMITTED PRIOR TO JULY 1, 1984,
WHO PLED NO CONTEST AND WAS
SENTENCED AFTER JULY 1, 1984, WAS
PROPERLY SENTENCED PURSUANT TO
THE AMENDED GUIDELINES, AND THIS
WAS NOT VIOLATIVE OF EX POST FACTO
PRINCIPLES.

In Ch. 84-328, the Legislature adopted the May 8, 1984, Florida Supreme Court's proposed revision to the sentencing guidelines. See The Florida Bar: Amendment to Rules of Criminal Procedures, 451 So.2d 824 (Fla. 1984). Respondent committed the offense of lewd assault of a child on May 21, 1984 (R-22,23). Respondent pled no contest to the charges of lewd assault on October 10, 1984 (R-2). Respondent was sentenced on October 10, 1984 (R-3)

In his appeal to the Fourth District Court, Respondent argued that the application of the amended guidelines was prohibited by ex post facto principles. The Fourth District agreed, vacated Respondent's sentence and remanded this cause for sentencing pursuant to the guidelines in effect at the time Respondent committed the offenses for which he was convicted.

The issue presented in the instant case, is whether the amended guidelines apply only to offenses committed after July 1, 1984, or to all sentencings after that date wherein the guidelines are applicable.¹

¹This case does not involve an offense committed before October 1, 1983, the effective date of the original guidelines.

This Court has recently resolved the aforesaid issue. In State v. Jackson ___ So.2d ___, 10 F.L.W. 564 (Fla. op. filed October 17, 1985), this Court stated:

The second issue in this case concerns the guidelines to be used in resentencing, Citing the Fifth District Court of Appeal decision in Carter v. State, 452 So.2d 953 (Fla. 5th DCA 1984), for the proposition that an amendment to the guidelines cannot be applied retroactively, the district court concluded that Jackson was entitled to be sentenced under the guidelines in effect at the time the sentence was imposed. The State argues that the district court erred in so holding and contends that the current guidelines must be used in the resentencing process.

We agree with the state that the presumptive sentence established by the guidelines does not change the statutory limits of the sentence imposed for a particular offense. We conclude that a modification in the sentencing guidelines procedure, which changes how a probation violation should be counted in determining a presumptive sentence, is merely a procedural change, not requiring the application of the ex post facto doctrine. In Dobbert v. Florida, 432 U.S. 282 (1977), the United States Supreme Court upheld the imposition of a death sentence under a procedure adopted after the defendant committed the crime, reasoning that the procedure by which the penalty was being implemented, not the penalty itself, was changed. We reject Jackson's contention that Weaver v. Graham, 450 U.S. 24 (1981), should control in these circumstances.

Id., emphasis added.

This Court's holding in Jackson thus indicates that the Fourth District Court of Appeal should not have ruled the the October 10, 1984 sentencing of Respondent under the amended guidelines as a violation the ex post facto provisions of

Florida's Constitution.

The Jackson case involved a change in the calculation of a probation violation into the presumptive sentence. Just as in Jackson, the instant case involves only an increase in the guidelines presumptive sentence range, and not an increase in the statutory limits of the sentence to be imposed.

The amendment to the guidelines changed only the procedural method through which the sentencing discretion of the trial court is to be exercised, without adding to the quantum of punishment authorized by statute. Because the amended guidelines as applied in the instant case affected only a procedural aspect of the sentence imposed, no violation of the constitutional ex post facto provision has been shown. See Jackson, supra, and Paschal v. Wainwright, 738 F.2d 1173, 1176 (11th Cir. 1984).

CONCLUSION

Based upon the foregoing argument, supported by the circumstances and authorities cited therein, Petitioner would respectfully request this Honorable Court to disapprove the opinion of the Fourth District Court of Appeal and remand the case with directions to affirm the sentence imposed by the trial court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Petitioner's Brief on the Merits has been sent by courier to: Gary Caldwell, Esquire, Assistant Public Defender, 224 Datura Street, 13th Floor, West Palm Beach, Florida 33401, this 19th day of December, 1985.



OF COUNSEL