

047

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA, )  
 )  
 Petitioner, )  
 )  
 vs. )  
 )  
 DONALD EUGENE HURST, )  
 )  
 Respondent. )  
 \_\_\_\_\_ )

**FILED**  
 SID J. WHITE  
 FEB 11 1986  
 CLERK, SUPREME COURT  
 By *[Signature]*  
 Chief Deputy Clerk

CASE NO. 67,453

RESPONDENT'S BRIEF ON THE MERITS

JAMES B. GIBSON  
 PUBLIC DEFENDER  
 SEVENTH JUDICIAL CIRCUIT

KENNETH WITTS  
 ASSISTANT PUBLIC DEFENDER  
 112 Orange Avenue, Suite A  
 Daytona Beach, Florida 32014  
 Phone: 904/252-3367

ATTORNEY FOR RESPONDENT

TABLE OF CONTENTS

	<u>PAGE NO.</u>
TABLE OF CONTENTS	i
TABLE OF CITATIONS	ii
STATEMENT OF THE CASE AND FACTS	1
SUMMARY OF THE ARGUMENT	2
ARGUMENT	
THE AMENDMENT OF THE COMMITTEE NOTE UNDER FLORIDA RULE OF CRIMINAL PROCE- DURE 3.701 (d) (12) CONSTITUTES A MORE SEVERE PUNISHMENT; THE SENTENCE IM- POSED WAS THEREFORE A VIOLATION OF <u>EX</u> <u>POST FACTO</u> DOCTRINE.	3
CONCLUSION	5
CERTIFICATE OF SERVICE	5

TABLE OF CITATIONS

CASES CITED:

PAGE NO.

<u>Hurst v. State</u> 474 So.2d 280 (Fla. 5th DCA 1985)	3
<u>State v. Jackson</u> 478 So.2d 1054 (Fla. 1985)	3,4
<u>State v. Williams</u> 397 So.2d 663 (1981)	4
<u>Vobbert v. Florida</u> 432 U.S. 282, 53 L.Ed.2d 344, 97 S.Ct. 2290 (1977)	4

OTHER AUTHORITIES:

Rule 3.701(d)(12), Florida Rule of Criminal Procedure	3
---	---

STATEMENT OF THE CASE AND FACTS

Respondent accepts the Statement of the Case and Facts as presented by the Petitioner in Petitioner's Brief on the Merits.

SUMMARY OF THE ARGUMENT

The amendment to the sentencing guidelines, as it relates to "split sentences" increases the quantum of punishment a defendant is exposed to. It is thus not a mere procedural change, and ex post facto doctrine should apply. For this reason the Court of Appeal's decision in this case should be affirmed.

POINT I

THE AMENDMENT OF THE COMMITTEE NOTE UNDER FLORIDA RULE OF CRIMINAL PROCEDURE 3.701 (d) (12) CONSTITUTES A MORE SEVERE PUNISHMENT: THE SENTENCE IMPOSED WAS THEREFORE A VIOLATION OF EX POST FACTO DOCTRINE.

ARGUMENT

The Petitioner has argued that this Court's decision in State v. Jackson, 478 So.2d 1054 (Fla. 1985), contradicts the opinion of the Fifth District Court of Appeal in Hurst v. State, 474 So.2d 280 (Fla. 5th DCA 1985), and calls for Hurst's original sentence to be reinstated. Respondent would point out that Jackson and Hurst deal with different issues. Jackson held that a change in guideline procedure which changes how a probation violation is counted does not require application of the ex post facto doctrine.

The amendment involved in this case is one which mandates increased punishment for a defendant sentenced under the new Committee Note.

In the case at bar the maximum range was three and one-half years. The sentence imposed was a total of thirteen and one-half years incarceration and probation. The amendment to Committee Note to Florida Rule of Criminal Procedure 3.701(d) (12), increased the quantum of punishment Respondent was subject to. In the case at bar the actual length of time Respondent could be sentenced to without reasons for departure was increased. The amendment made the punishment for the crime

more severe after the crime was committed, thus creating an ex post facto violation. See Vobbert v. Florida, 432 U.S. 282, 53 L.Ed.2d 344, 97 S.Ct. 2290 (1977). State v. Williams, 397 So.2d 663 (1981).

In the case at bar the lower court gave no reasons for departing from the guidelines. The court was thus limited to the guidelines maximum in sentencing Respondent. The amendment to the Committee Note removed the restriction on the sentencing court and allowed a lengthier sentence to be imposed.

This Court in Jackson did not hold that any change in the guidelines is not subject to ex post facto doctrine, only procedural changes. The amendment involved in the case at bar constitutes a substantive change. It is the penalty, not the procedure, that the amendment changes. Thus Jackson does not overrule the opinion of the Fifth District Court of Appeal in the case at bar. The date the crime was committed should be the controlling date in the violation of the ex post facto doctrine that took place in the case at bar. The opinion of the Court of Appeal in this case should be affirmed.

CONCLUSION

BASED UPON the arguments made and authorities cited herein, Respondent respectfully asks this Honorable Court to affirm the decision of the Fifth District Court of Appeal in this case.

Respectfully submitted,

JAMES B. GIBSON  
PUBLIC DEFENDER  
SEVENTH JUDICIAL CIRCUIT

*Kenneth Witts*

\_\_\_\_\_  
KENNETH WITTS  
ASSISTANT PUBLIC DEFENDER  
112 Orange Avenue, Suite A  
Daytona Beach, Florida 32014  
Phone: 904/252-3367

ATTORNEY FOR RESPONDENT

CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that a true and correct copy of the foregoing has been served upon the Honorable Jim Smith, Attorney General, 125 N. Ridgewood Avenue, Fourth Floor, Daytona Beach, Florida 32014; and mailed to Donald Eugene Hurst, Inmate No. 919175, Reception & Medical Center, Post Office Box 628, Lake Butler, Florida 32054-0628, on this 10th day of February, 1986.

*Kenneth Witts*

\_\_\_\_\_  
KENNETH WITTS  
ASSISTANT PUBLIC DEFENDER