

IN THE SUPREME COURT OF FLORIDA

TERRY JOE WILKERSON,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

7/23 1987
CASE NO. 68,181

ON REMAND FROM THE U. S. SUPREME COURT

BRIEF OF PETITIONER

MICHAEL E. ALLEN
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

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II STATEMENT OF THE CASE AND FACTS

The history of this case is accurately stated in the opinion of the First District:

The offense with which appellant was charged occurred on March 28, 1984, and appellant entered his nolo plea on October 30, 1984. Judgment and sentence were entered on January 8, 1985. On May 28, 1981, appellant had been convicted in juvenile court of lewd assault. The guidelines scoresheet prepared on appellant assessed eighty points for the May, 1981, conviction, giving him a total point score of 232, resulting in a recommended prison sentence of four and one-half to five and one-half years.

The original version of rule 3.701(d) (5)(c) provided that certain juvenile dispositions which occurred within three years of the current conviction shall be included in a defendant's prior record for scoring purposes. However, that rule was amended, effective July 1, 1984, to provide that certain juvenile dispositions which occurred within three years of the commission of the instant offense may be scored as prior record. At the sentencing hearing, defense counsel argued that since the present offense occurred prior to the effective date of the amendment, the original rule should apply in appellant's case; and, if the original rule applies, the prior conviction should not be scored since it occurred more than three years prior to the conviction in the instant case. The trial judge rejected defense counsel's argument and imposed the maximum sentence of sixty-six months (or five and one-half years), within the recommended guidelines range.

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In the instant case, if appellant's guidelines scoresheet had been prepared pursuant to the original rule, appellant would have had a total of 152 points which

would have resulted in a recommended sentence of community control or twelve to thirty months' incarceration. Thus, obviously, the amendment to the guidelines was disadvantageous to appellant and under the above authorities, application of the amendment in this case would be considered error.

(Appendix A; 480 So.2d at 214-15).

The First District held:

We are compelled to follow the ruling of the supreme court, as we understand it to be, that the appropriate guidelines to apply in sentencing a defendant are the guidelines in effect at the time of the present sentencing; since the guidelines (and any amendments thereto) do not change the statutory limits of a sentence to be imposed for a particular offense and shall be considered procedural only, consideration of the ex post facto doctrine is not applicable to questions involving guidelines and amendments.

(Appendix A; 480 So.2d at 215). Judge Barfield filed a concurring opinion, questioning whether this Court intended State v. Jackson, 478 So.2d 1054 (Fla. 1985) to be applied to all guidelines revisions (Appendix A; 480 So.2d at 215-16).

The First District certified the question to this Court and on September 18, 1986, this Court held that Jackson applied and affirmed petitioner's sentence (Appendix B).

Thereafter, petitioner sought review by the U. S. Supreme Court. By order dated June 15, 1987, that Court vacated petitioner's sentence and remanded to this Court. Wilkerson v. Florida, #86-5842 (U.S. June 15, 1987) (Appendix C). This

Court requested supplemental briefs by order dated July 27,
1987.

III SUMMARY OF ARGUMENT

Petitioner contends that the guidelines in effect on the date the offense was committed should be used to calculate his presumptive guideline sentence. The sentencing guidelines are substantive not procedural law. An amendment to the sentencing guidelines is likewise a matter of substantive law and not merely procedural law. In Weaver v. Graham, 450 U.S. 24 (1981), the United States Supreme Court set forth a two fold test to assess an ex post facto violation. Petitioner maintains that retrospective application of the amended guidelines in these circumstances results in a violation of the ex post facto clauses.

Moreover, the Supreme Court held in Miller v. Florida, 107 S.Ct. 2446 (1987) that revisions to the sentencing guidelines, which call for a harsher sentence than that called for by the guidelines in effect at the time of the crime, cannot be retroactively applied.

IV ARGUMENT

ISSUE PRESENTED

PETITIONER, WHOSE OFFENSE WAS COMMITTED PRIOR TO JULY 1, 1984, BUT WHO WAS SENTENCED AFTER THAT DATE, WAS IMPROPERLY SENTENCED UNDER THE AMENDED SENTENCING GUIDELINES.

The sentencing guidelines set forth in Florida Rule of Criminal Procedure 3.701, are based on specific delineation of the sentence ranges to be imposed for various offense categories. Section 921.001, Florida Statutes (1983); In Re Rules of Criminal Procedure, 439 So.2d 848 (Fla. 1983). In 1983, the Legislature authorized the Florida Supreme Court upon receipt of the commission's recommendations, to develop by September 1, 1983, statewide sentencing guidelines. Section 921.001(4)(a), Florida Statutes (1983). This Court adopted the guidelines to become effective on October 1, 1983. See In Re Rules of Criminal Procedure (Sentencing Guidelines), 439 So.2d 848 (Fla. 1983).

On May 8, 1984, Rule 3.701 and the committee notes thereto were amended. See The Florida Bar: Amendment to Rules of Criminal Procedure, 451 So.2d 824 (Fla. 1984). The effective date of this Amendment is July 1, 1984. Ch. 84-328, Laws of Florida (1984). One of the principle effects of the amendments was "increased rates and length of incarceration for sexual offenders." 451 So.2d at 824, fn. Another was the method of scoring previous juvenile convictions. Id.

Under Section 921.001(4)(b), Florida Statutes (1983), these amendments were effective only upon adoption by the Florida Legislature. In Chapter 84-328, Section 1, Laws of Florida, the legislature adopted the amended guidelines.

In Miller v. Florida, supra, the defendant was convicted of sexual battery, which occurred on April 25, 1984, at which time the sentencing guidelines called for a 3 1/2 - 4 1/2 year sentence. Included in the 1984 amendments was an increase in the point values on the sexual battery scoresheet. When Miller was sentenced on October 2, 1984, the revised scoresheet was used to impose a seven year sentence.

The U. S. Supreme Court repeated the test for an ex post facto violation from Weaver v. Graham, supra:

As was stated in Weaver, to fall within the ex post facto prohibition, two critical elements must be present: first, the law "must be retrospective, that is, it must apply to events occurring before its enactment"; and second, "it must disadvantage the offender affected by it."

Miller v. Florida, supra, 107 S.Ct. at 2451. The Court then distinguished Dobbert v. Florida, 432 U.S. 282 (1977) and held:

Finally, the revised guidelines, directly and adversely affect the sentence, petitioner receives. Thus, this is not a case where we can conclude, as we did in Dobbert, that "[t]he crime for which the present defendant was indicted, the punishment prescribed therefor, and the quantity or the degree of proof necessary to establish his guilt, all remained unaffected by the subsequent statute." 432 U.S., at 294, 97 S.Ct. at 2298.

The law at issue in this case, like the law in Weaver, "makes more onerous the punishment for

crimes committed before its enactment." Weaver, 450 U.S., at 36, 101 S.Ct. at 968. Accordingly, we find that Florida's revised guidelines law, 1984 Fla.Laws, ch. 84-328, is void as applied to petitioner, whose crime occurred before the law's effective date. We reverse the judgment of the Supreme Court of Florida, and remand the case for further proceedings not inconsistent with this opinion.

Miller v. Florida, supra, 107 S.Ct. at 2454.

The same is true in the instant case. The 1984 amendment concerning the method of scoring petitioner's juvenile convictions has the same onerous effect as the 1984 amendment concerning the assessment of points on Miller's scoresheet, i.e., it results in a more harsh presumptive guidelines sentence. This Court must follow Miller and hold that petitioner's sentence is governed by the guidelines rules in effect on the date of his crime, which called for a maximum sentence of 12-30 months.

V CONCLUSION

On the grounds stated herein, the prior decision of this Court should be withdrawn, and petitioner's sentence vacated.

Respectfully submitted,

MICHAEL E. ALLEN
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

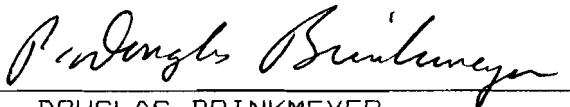


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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by hand delivery to Mr. Royall P. Terry, Assistant Attorney General, The Capitol, Tallahassee, Florida, and a copy has been mailed to petitioner, Mr. Terry Joe Wilkerson, #096260, F-201, Post Office Box 667, Bushnell, Florida, 33513, this 5 day of August, 1987.


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