

IN THE SUPREME COURT OF FLORIDA

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TERRY JOE WILKERSON,
Petitioner,

v.

CASE NO. 68,181

STATE OF FLORIDA,
Respondent.

BRIEF OF RESPONDENT ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner was the appellant in the lower court and the defendant in the trial court. The parties will be referred to as they appear before this court. References to the appendix attached to petitioner's brief will be made by the symbol "App." followed by appropriate page number. References to the record on appeal in the lower court will be made by the symbol "R" followed by appropriate page number.

SUMMARY OF ARGUMENT

The court below was correct in following this court's holding in Jackson v. State, ____ So.2d ____ (Fla. 1985), 10 F.L.W. 564.

Changes in the sentencing guidelines effected subsequent to the commisssion of petitioner's offense which may increase the actual length of his incarceration in the discretion of an autonomous authority (guidelines commissions) but do not increase the quantum of punishment to which he is legislatively exposed are not violative of the Ex Post Facto Clause of Art.I, § 10 of the United States Constitution nor of Art.X, § 9 of the Florida Constitution (1968), when such changes are ameliorative in nature.

Such changes have been held by the United States Supreme Court, the lower federal courts, and by this court (Jackson v. State, supra) to be procedural in their application and not offensive to any rights guaranteed under the federal or state constitutions.

ARGUMENT

ISSUE

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

The case sub judice does not involve any change in or amendment to the sentencing guidelines which in and of itself affects either a legislatively mandated maximum sentence or increase in a discretionarily imposable term of incarceration for petitioner. The amendment involved merely resets the time reference points for scoring of prior juvenile dispositions which are the equivalent of scorable criminal convictions for purposes of determining the recommended sentence range. More specifically, prior to July 1, 1984, a juvenile "conviction" occurring within three years of the current conviction (disposition) was included in the defendant's prior record. After July 1, 1984, the three-year frame of reference was reset to refer to the period between disposition of the earlier case and commission of the instant offense.

The obvious intent of the guidelines commission in amending the rule was to render finite the subject three-year period. As petitioner put it "the sentencing [or conviction] date is too capricious or elastic a concept to gauge a uniform state-wide system of sentencing guidelines." (Petitioner's brief, p. 24)

Although the amendment may have proved disadvantageous to petitioner it is an ameliorative measure, procedural in nature, and not offensive to the ex post facto clause.

Petitioner makes much over the proposition that the "average" offender has some vested right of "expectation of being sentenced within the range provided for by the sentencing guidelines." Petitioner ignores the fact that there are no less than thirteen recommended ranges for sentencing under category two (sexual offenses) crimes. Recommended ranges vary from "any non-state prison sanction" (124-169 points) to "life" (583 plus points). (R 83).

Point totals are calculated from subtotals based upon seriousness and number of counts of primary offense(s), seriousness and number of counts of additional offense(s) at conviction, seriousness and number of prior convictions scorable, legal status of offender at the time of the offense and seriousness of victim injury, if any. (R 82)

In addition to all of these variables there is the further possibility that the trial judge will elect to depart from the sentence guidelines and sentence the offender to a term of incarceration far in excess of the recommended range or even impose the maximum allowable sentence under the applicable statute.

What petitioner is saying is that a person contemplating a sexual offense (in the case at bar, lewd assault upon a child) would analyze all of the aforementioned criteria as they pertain to himself, assume that the trial judge could not or would not depart from the recommended range and that the sentencing guidelines commission would not be meeting and possibly changing the weighting values and/or other pertinent rules (in the case at bar, Fla. R. Crim. P. 3.701 d. 5. c.) that might bear on the ultimate length of incarceration. Presumably, the offender would then enjoy a vested right to be sentenced under the rules in effect at the time of the commission of the offense without fear that the trial judge might reject the guidelines range and sentence him to a maximum term after recording clear and convincing reasons for doing so. This would be pure gamesmanship and is not the law of Florida.

This court has been faced with issues similar to the one sub judice, in the past. This court has consistently held that discretionary rules changes that do not affect statutory maximum sentences are procedural in nature and not ex post facto laws. May v. Florida Parole & Probation Commission, 435 So.2d 834 (Fla. 1983), Mills v. State, 462 So.2d 1075 (Fla. 1985), Preston v. State, 444 So.2d 939 (Fla. 1984).

More recently this court decided State v. Jackson, So.2d _____ (Fla. 1985), 10 F.L.W. 564, where the pertinent

precise question was whether sentencing guidelines in effect at the time of original sentencing must be applied if the guidelines in effect at the time of resentencing (after revocation of probation) resulted in a longer term of incarceration. Again, this court held that modification of sentencing guidelines is a procedural change and not requiring application of the ex post facto doctrine. This court relied upon Dobbert v. Florida, 432 U.S. 282 (1977), and rejected the application of Weaver v. Graham, 450 U.S. 24 (1981), which petitioner urges is controlling.

In Dobbert, supra, the Supreme Court held that a change in the procedure by which the penalty in a capital case was implemented was a procedural change and not a change in the penalty itself. Under the new procedure the trial judge could actually overrule the jury's recommendation of mercy and impose the death penalty. This might work to the disadvantage of a murderer whose crime was committed at an earlier time when the jury's recommendation was binding. The death penalty statute itself is adequate notice to the public as to the possible results of the commission of a capital crime.

Weaver v. Graham, supra, involved a statutory change in the method of computing prisoners' gain time. This was a change in the substantive law and should be disregarded for purposes of deciding the case sub judice.

In 1984 the United States Court of Appeals for the Eleventh Circuit decided Dufresne v. Baer, Chairman, U.S. Parole Commission, et al., 744 F.2d 1543 (11th Cir. 1984). Dufresne was convicted of trafficking in illegal drugs and in between the date of his offense and the time his presumptive sentence was determined the U. S. Parole Commission altered some of the criteria for determining presumptive (drug) sentences. The result was that the defendant might be incarcerated for a longer period than he would have under the old guidelines. The Eleventh Circuit affirmed, holding that the change was merely procedural and did not add to the quantum of punishment. Thus, it cannot violate the ex post facto clause even if it is applied retroactively.

The situation in Dufresne is analogous to the case sub judice in many respects and some portions of the Eleventh Circuit's rationale are worthy of quotation for guidelines in the instant case.

The ex post facto clause at issue commands that "[n]o . . . ex post facto law shall be passed." U. S. Constit. Art.I, § 9, Cl. 3. An ex post facto law posses three characteristics:it is a criminal or penal measure, retrospective, and disadvantageous to the offender because it may impose greater punishment. [Citations omitted.]

* * *

. . . .They [federal parole guidelines] do not state rules of conduct for the public. A change in

the guidelines does not affect the maximum or minimum prison sentence a court may impose, the point at which the prisoner becomes eligible for parole or his mandatory release date on good time. Accord, Portley v. Grossman 444 U. S. 1311, 1312-13, 100 S.Ct. 714, 715, 62 L.Ed.2d 723 (1980). . . .

Because the guidelines in question are not criminal laws and their amendment did not add to the punishment prescribed for petitioner's crime, petitioner has failed to establish two of the requisite elements of an ex post facto claim. Accordingly, the judgment of the district court denying his claim is

AFFIRMED.

Id. at 1546,1550.

Petitioner has failed to make any showing that the challenged rule change involves "a criminal or penal measure."

Id. Respondent concedes that the case sub judice involves "retroactive" application and disadvantage to the offender but these two factors, without more, render same outside the protections of the ex post facto clause.

The Eleventh Circuit further said: "Congress intended that the commission periodically amend the guidelines to reflect contemporary views concerning the seriousness of given crimes and parole rescidivism. E.g. S.Rep. No. 369, 94th Cong., 2d Sess.18, reprinted in 1976 U.S.Code Cong. & Ad. News 335. Such amendments

are not indicative of provisions which have the force and effect of law." Id. at 1550.

The Florida sentencing guidelines commissions are charged with monitoring and amending the guidelines to ensure uniform sentencing and prevent the imposition of arbitrary and capricious sentences. § 921.001(1), (4)(b), (7), F.S. Such periodic evaluation and recommendation of changes on a continuing basis "to ensure certainty of punishment as well as fairness to offenders and to citizens of the state" are clearly ameliorative as far as the purpose of the enabling statutes are concerned. § 921.001(1), F.S.

CONCLUSION

Application of the amended rule after the petitioner committed his offense but prior to his sentencing did not involve punishment as a crime, an act previously committed that was innocent when done, did not make more burdensome the punishment for the crime after its commission as the quantum of punishment was unaffected nor did it deprive petitioner of any defense available according to law at the time the act was committed.

A procedural change is not ex post facto even though it might work to the disadvantage of the defendant. The arguments advanced by petitioner to the effect that application of the rule as amended after the commission of petitioner's offense offends the ex post facto clause have already been dealt with by the United States Supreme Court in Dobbert v. Florida, supra, and for the reasons set out so lucidly by Justice Rhenquist in the opinion he wrote for the Court, petitioner's arguments must fail. Under Art.I, § 10, Constitution of the United States, which prohibits the states from passing any ex post facto law, a procedural change is not ex post facto, even though it may work to the disadvantage of the defendant.

The legislative basis for the sentencing guidelines law is substantive in nature but procedural and ameliorative in

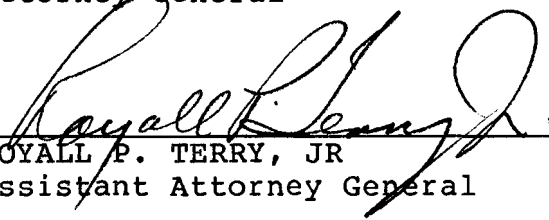
effect, in that the stated purpose as announced in the enabling legislation is to develop, implement, and devise a uniform sentencing policy in cooperation with the Supreme Court. The enabling legislation also provides for periodic evaluation and changes as are necessary to ensure certainty of punishment, as well as fairness to offenders and to citizens of the state.

The decision by the guidelines commission to provide for scoring of additional points if a former juvenile offender commits another criminal offense as an adult within three years of disposition of his last juvenile offense is procedural in nature and was obviously adopted for the purpose of pinpointing the date at which additional points were assignable rather than to continue application of the former rule which was contingent upon the disposition date of the later offense. This would be arbitrary in view of the fact that the disposition time might vary considerably between cases and defeat the purpose for which even the original rule was formulated.

The lower court should be affirmed in all respects and more specifically in its holding that State v. Jackson, supra, is the law of the case sub judice and that, as in Jackson, Dobbert v. Florida is controlling. Petitioner's contention that Weaver v. Graham, supra, controls should be, as in Jackson, rejected by

this court. The question certified by the court below as one of great public importance should be, based upon the great weight of authority, answered in the affirmative.

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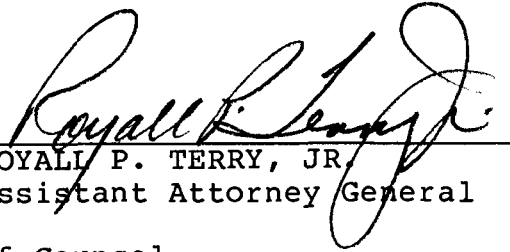

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have furnished a copy of the foregoing Brief of Respondent on the Merits to P. Douglas Brinkmeyer, Esq., Assistant Public Defender, Post Office Box 671, Tallahassee, Florida 32302, by hand-delivery, this 6th day of February, 1986.



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