IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,	)	
	)	
Petitioner,	)	
	)	
v.	)	CASE NO. 68,489
	)	
	)	
KIMBERLY MESTAS,	)	
	)	
Respondent.	)	
	)	

BRIEF OF PETITIONER ON THE MERITS

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PRELIMINARY STATEMENT

This case is before the Florida Supreme Court on discretionary review of the decision of the Second District Court of Appeal certified by that court to be in conflict with the decisions of other district courts of appeal. In this brief, the parties will be referred to by their proper names or as they stand before this Court. The letter "R" will be used to designate references to the record on appeal. All emphasis is supplied unless otherwise indicated.

STATEMENT OF THE CASE

On August 2, 1984, an information was filed in the Circuit Court for Hillsborough County charging 17-year old Kimberly Mestas with one count of grand theft in the second degree pursuant to Sections 812.014(2)(b) and 39.04(2)(e)(4) of the Florida Statutes. (R. 2).

A hearing to accept Ms. Mestas' plea of guilty was held before Judge Harry Lee Coe, III on September 18, 1984. (R. 30).

On November 27, 1984, Notice of Appeal was filed. (R. 20). On January 31, 1986, the Second District Court of Appeal filed an opinion affirming the defendant's placement on probation but remanding to the trial court to strike the condition of probation requiring her to serve two years community control. Mestas v. State, Case No. 84-2602 (Fla. 2nd DCA, January 31, 1986). On motion for rehearing, the Second District Court of Appeal denied rehearing but certified a direct conflict with the Fifth District Court of Appeal decision, Louzon v. State, 460 So.2d 551 (Fla. 5th DCA 1984), and the First District Court of Appeal decision, Davis v. State, 461 So.2d 1003 (Fla. 1st DCA 1984).

STATEMENT OF THE FACTS

Kimberly Mestas was 17 years old when she was charged with stealing several pieces of jewelry from Ellen Knight on June 6, 1984. (R. 4). An information was filed on August 2, 1984, charging her with grand theft in the second degree. (R. 2).

Ms. Mestas waived arraignment and pled guilty pursuant to a plea agreement. (R. 31, 36). At a hearing on September 18, 1984, it was alleged that, while Ms. Mestas was in the house of an acquaintance, Ellen Knight, and Ms. Knight was taking a shower, Ms. Mestas took some gold jewelry which the State maintained was worth $881.00. (R. 31). After examining Ms. Mestas under oath regarding her plea, the Court found a sufficient factual basis and accepted her plea. (R. 32 - 34). Adjudication was withheld and a pre-sentence investigation report was ordered. (R. 34).

At the outset of the sentencing hearing held on November 16, 1984, defense counsel reminded the Court that Ms. Mestas pled for probation. (R. 36). The defendant refused to stipulate to the State's assertion that the stolen property was worth $843.00. (R. 37). A total of 13 points was computed on the defendant's sentencing guidelines scoresheet, translating into a recommendation of any non-state prison sanction. (R. 16 - 17).

The Court then sentenced Ms. Mestas to a five-year term of probation, with the condition that the first two years be served

under community control. Orders to pay $843.00 in restitution and $250.00 in court costs were also imposed. (R. 38). The defendant objected to the sentence imposed, stating that it was illegal as it was contrary to the sentencing guidelines as well as the plea agreement which formed the basis for her guilty plea. (R. 39 - 41).

SUMMARY OF THE ARGUMENT

The term "any non-state prison sanction" in sentencing guidelines applies to community control, as community control is not a State prison sanction. Community control is a non-incarcerative alternative to a prison sanction. Thus, community control is a proper sanction to be imposed under sentencing guidelines category of "any non-state prison sanction", and does not constitute a departure therefrom.

ARGUMENT

ISSUE

WHETHER COMMUNITY CONTROL CONSTITUTES A "NON-STATE PRISON SANCTION" WITHIN THE MEANING OF THE SENTENCING GUIDELINES RULES.

Respondent entered a plea of guilty to second degree grand theft and was placed on five years probation with the special condition that the first two years be served under community control. Under her sentencing guidelines scoresheet, Respondent was eligible for "any non-state prison sanction." (R. 16); Fla. R. Crim. P. 3.988(f). The Second District held that the community control provision was improper because it placed the defendant in the next higher cell under the guidelines, which recommends a sanction of community control or twelve to thirty months of incarceration. The Court reasoned:

> Thus, this sentence was a departure from the recommended range of any non-state prison sanction. Consequently, the court erred in failing to provide written reasons for this departure. (citations omitted).
>
> (Appendix, Exhibit I).

By contrast, the Fifth District Court of Appeal in Louzon v. State, 460 So.2d 551 (Fla. 5th DCA 1984), held that community control does not encompass incarceration in state prison and therefore is properly classified as a "non-state

prison sanction." This same conclusion was reached by the First District Court of Appeal in Mitchell v. State, 463 So.2d 416 (Fla. 1st DCA 1985), and Davis v. State, 461 So.2d 1003 (Fla. 1st DCA 1984). In Mitchell, the Court reasoned:

> The terms "any nonstate prison sanction" clearly apply to community control, as community control simply is not a state prison sanction. Community control is defined as a form of intensive, supervised custody in the community, including surveillance on weekends and holidays, administered by officers with restricted caseloads, and, further, defined as an individualized program in which the freedom of an offender is restricted within the community, home, or noninstitutional residential placement and specific sanctions are imposed and enforced. Section 948.001(1), Florida Statutes (1983). Section 948.01(4) states that the court may place an offender in a community control program, if it appears to the court that probation is an unsuitable dispositional alternative to imprisonment. Section 948.10(1) states that community control "shall offer the courts and the Parole and Probation Commission an alternative, community-based method to punish an offender in lieu of incarceration. . ." (emphasis added). Clearly, community control is not to be regarded as incarceration and certainly is not to be regarded as a state prison sanction. Rather, it is apparent to us that community control is a nonprison custodial alternative that was developed by the legislature to alleviate prison overcrowding. See Chapter 83-131 Fla. Laws, section 2. Accordingly, we find and hold that community control is a proper sanction to be imposed under the sentencing guidelines category of "any nonstate prison sanction." (footnote omitted).
>
> 463 So.2d at 418.

The Court further stated that the fact that the guidelines specifically listed community control as an alternative to incarceration in the second guidelines cell should not preclude community control from being used as a dispositional alternative under the first guideline cell of "any non-state prison sanction". 463 So.2d at 418, n.2.

The State acknowledges that recent amendments to the Florida Rules of Criminal Procedure, effective July 1, 1986 pending legislative approval reflect a position contrary to that presented herein. The Florida Bar Re: Rules of Criminal Procedure, Case No. 67,703 (Fla. December 19, 1985)[11 FLW 15] (amended committee note (d)(13). However, the State urges this Court to reconsider this issue in light of the First District's reasoning in Mitchell.

As further support, the State contends that requiring clear and convincing reasons for imposing community control when the defendant's presumptive guideline range is "any non-state prison sanction", leads to an illogical result in the application of the guidelines rules. Where a court finds that ordinary probation is inadequate, it may impose, as a condition of probation, a period of incarceration or a split sentence of incarceration followed by probation. Florida Statute 948.01(8); § 948.03(4).

In so doing, the Court has not exceeded the presumptive guideline range. Yet, if we apply the reasoning of the Second District, where a court finds that ordinary probation is inadequate, it must provide clear and convincing reasons before imposing, in conjunction with probation, a period of community control, a sanction less restrictive on personal freedom than incarceration. Such a result is obviously inconsistent with a logical application of the sentencing guidelines.

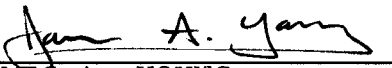
Accordingly, the State urges this Honorable Court to resolve the conflict between the districts by holding that community control does constitute a "non-state prison sanction" and may be imposed by a trial court without providing clear and convincing reasons where the defendant's sentencing scoresheet places him in the first guidelines cell calling for "any non-state prison sanction".

CONCLUSION

Based on the foregoing reasons and authorities, Petitioner respectfully requests this Honorable Court to quash the decision of the Second District Court of Appeal and remand the case with directions to affirm the trial court's judgment and sentence.

Respectfully submitted,

JIM SMITH
ATTORNEY GENERAL



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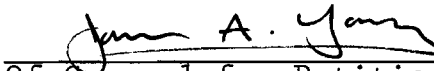
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to DEBORAH K. BRUECKHEIMER. Assistant Public Defender, County Courthouse Annex, Tampa, Florida 33602 - 4197 on this 16th day of April, 1986.



Of Counsel for Petitioner