IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,
Petitioner,

v.

KIMBERLY MESTAS
Respondent.

CASE NO: 68,489

DISCRETIONARY REVIEW OF CASE NO. 84-2602, OF THE DISTRICT COURT OF APPEAL OF FLORIDA, IN AND FOR THE SECOND DISTRICT. THERE HEARD ON APPEAL FROM THE CIRCUIT COURT IN THE THIRTEENTH JUDICIAL CIRCUIT FOR HILLSBOROUGH COUNTY, FLORIDA.

AMENDED BRIEF OF RESPONDENT ON THE MERITS

J. MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

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STATEMENT OF THE CASE AND FACTS

Respondent, Kimberly Mestas, accepts the statement of the case and facts as presented in the Petitioner's brief, but would add that the Respondent was found to be indigent and the Public Defender for the Tenth Judicial Circuit was appointed to represent her for the purposes of appeal. (R 25)

SUMMARY OF ARGUMENT

Kimberly Mestas, whose recommended Guidelines sentence was "any non-State prison sanction," received a five-year term of probation with a condition that she serve a two-year term of community control. Community control may not be imposed as an alternative to a non-State sanction without providing written reasons justifying the departure sentence. The Sentencing Guidelines support this, particularly the most recent amendments thereto, which have already been approved by this Court and will take effect July 1, 1986, subject to legislative approval. The Second District Court of Appeals' decision to strike Ms. Mestas' term of community control must be affirmed based on the plain language of the Sentencing Guidelines, as approved by this Court.

ARGUMENT

THIS COURT'S DETERMINATION THAT COMMUNITY CONTROL DOES NOT CONSTITUTE A "NON-STATE PRISON SANCTION" WITHIN THE DEFINITION OF THE SENTENCING GUIDELINES REQUIRES THAT THE DECISION OF THE SECOND DISTRICT COURT OF APPEAL BE AFFIRMED.

Kimberly Mestas' recommended guidelines sentence was "any non-State prison sanction." (R 16-17) The sentence imposed, two years community control as a condition of five years probation, was clearly improper since the court failed to provide written reasons for imposing community control which is a departure from the category of "non-State prison sanction." The Second District Court of Appeal was correct in its decision to strike that portion of Ms. Mestas' sentence imposing a term of community control.[1]

As the State admits, this Court has already decided this issue. The most recent amendments to the sentencing guidelines, approved by this Court, clarify this specific question. A sentence was added to the committee note dealing with the imposition of community control, followed by an explanatory note:

> "Community control is not an alternative sanction from the recommended range of any non-State prison sanction unless the provisions of Florida Rule of Criminal Procedure

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1) The sanction of community control was improper for another reason. Since Ms. Mestas was seventeen years old when she was charged with the instant offense, (R 4), the trial court was required to provide written reasons for imposing adult sanctions. Fla. Stat. sec. 39.111(6) (1983). Failure to comply with this statutory requirement, even in the absence of an objection by the defendant, constitutes reversible error. State v. Rhoden, 448 So.2d 1013 (Fla. 1984). Although the probationary term may not be subject to reversal as it was imposed pursuant to a plea agreement, Pendarvis v. State, 400 So.2d 494 (Fla. 5th DCA 1981), the community control was not part of that plea (R 40, 41). The adult sanction of community control must be reversed on this basis.

> 3.701(d)(11) [articulated reasons for departure] are applied." This revision is intended to clarify the intent of the commission that community control is not to be considered as a non-state prison sanction under the guidelines.

The Florida Bar Re: Rules of Criminal Procedure (Sentencing Guidelines), 11 F.L.W. 15 (Fla. Dec. 19, 1985). As the State acknowledges, this Court has approved this amendment which, subject to legislative approval, will become law on July 1, 1986. However, the State urges this Court to reconsider its decision. (St's. br. at 8)

The State relies predominantly on Mitchell v. State, 463 So.2d 416 (Fla. 1st DCA 1985), which stated, before this Court's approval of the above-mentioned amendment, that community control is encompassed within the definitional category of "any non-State prison sanction." The logic and reasoning of the Mitchell opinion, including a description of community control and its purposes, is valid up to its final conclusion that the sanction is properly imposed under the "non-State prison sanction" category.

Even if one disregards the amendment clarifying that community control is not to be imposed pursuant to a recommendation of "any non-State prison sanction," the Guidelines' scoresheets for each category of offenses show that community control is the recommended sanction for those defendants whose scores put them in the cell above that recommending "any non-State prison sanction." The sanctions of community control and twelve to thirty months incar-

ceration are listed together in this second cell. Fla.R.Crim.P. 3.988. Further, community control is specified by statute as a sanction to be imposed when probation is found to be unsuitable. Fla. Stat. sec. 948.01(4) (1985). This shows clearly that non-State prison sanctions such as probation are to be distinguished from community control.

Notwithstanding committee note (d)(8) to the Guidelines which states that a recommendation of any non-State prison sanction "allows the court the flexibility to impose...any nonincarcerative disposition," the courts are specifically restricted from imposing the particular disposition of community control by committee note (d)(13). Fla.R.Crim.P. 3.701, comm. notes (d)(8) and (d)(13). Statutory sections in pari materia should be construed together to give full effect to legislative intent. Ferguson v. State, 377 So.2d 709 (Fla. 1979). It appears that the more specific note (d)(13) is a qualification and clarification of the much more general note (d)(8).

It is incongruous that the Mitchell Court determined that it was "not at liberty to alter or distort the plain meaning of the language in R.Cr.P. 3.701(d)(13)" with regard to the imposition of community control as a condition of probation, but that it felt at liberty to disregard the clear line of demarcation between the first cell of the guidelines, allowing for the imposition of non-State prison sanctions, and the second cell allowing for community control. Mitchell, 463 So.2d at 419. The Mitchell Court's reasoning, that

community control must be a "non-State prison sanction" within the meaning of the Guidelines because it is imposed "in lieu of incarceration," (St's br. at 7), is unconvincing. The more logical conclusion is that, on a continuum of severity of sanction, probation and community control are categorized very differently. The Mitchell Court's description of community control supports this.

In the second part of its argument (St's. br. at 8), the State again ignores the differences inherent in the sentencing alternatives available to the court. Its argument that courts should be allowed to impose a sentence of community control and probation without exceeding the recommended range is faulty on several grounds and misleading in its analogy to the imposition of incarceration as a condition of probation. (St's. br. at 8) First, the State makes no distinction between split sentences of incarceration and probation and sentences of probation containing a condition of incarceration. (St's br. at 8) The State erroneously suggests that a sentence of probation coupled with a term of incarceration of any length may properly be imposed pursuant to the recommended range of "any non-State prison sanction." In fact, a term of no more than 364 days in the county jail may be imposed as a condition of probation. Fla.Stat. sec. 948.03(4) (1985). Imposition of a prison term on someone who scores to "any non-State prison sanction" constitutes a departure and requires written reasons therefor. Fla.R.Crim.P. 3.701 d.11. The plain meaning of the relevant statutes as well as the authority from several District Courts of Appeal show that the same must be true of community control.

While the State cites Mitchell for its proposition that community control constitutes a non-State prison sanction, the Court also held that community control could not properly be imposed as a condition of probation. Mitchell, 463 So.2d at 419. The court cited to its earlier decision in Williams v. State, 464 So.2d 1218, 1220 (Fla. 1st DCA 1985), in which it stated that a sentence of probation with a condition of community control "would result in a mongrelization of the dispositional alternatives of community control and probation. We believe this would be manifestly contrary to the legislative intent as to the proper purpose and application of these alternative dispositions." The holding in Williams was followed by another District Court of Appeal in Chessler v. State, 467 So.2d. 1102 (Fla. 4th DCA 1985). The reasoning is based in part on the statutory directive which states that community control may be imposed if "it appears to the court...that probation is an unsuitable dispositional alternative to imprisonment." Fla.Stat. sec. 948.01(4) (1983). Community control is to be considered a more harsh and severe alternative to probation, rather than a condition thereof.

The State's argument also ignores the clear language of the second portion of the recent amendment to the Guidelines' committee note (d)(13). While stating that community control may not be imposed as an alternative to a non-State prison sanction, the amended note also states that a sentence of of community control may be followed by a term of probation. The Florida Bar Re: Rules

of Criminal Procedure (Sentencing Guidelines), 11 F.L.W. 15 (Fla. Dec. 19, 1985). This type of sentence, like that imposing a prison term followed by probation, would constitute a departure from the first Guidelines cell of "any non-State prison sanction," and is obviously distinguishable from a sentence of probation which includes a condition of community control.

The State's analogy to a probation term which includes a condition of a jail sentence fails to point out that a term of community control, imposed as a condition of probation, would involve considerably more complex factors than a jail term. A defendant receiving a jail term receives credit for all pre-sentence incarceration and can earn gain-time so that his 364-day term is likely to be reduced considerably. Further, a jail term does not subject a defendant to the same risk of revocation as does a term of community control. These differing factors provide a valid basis for the distinction between incarceration and community control as conditions of probation, and support the amendment to the Guidelines, and this Court's approval thereof.

The definition of "any non-State prison sanction," as provided by the Mitchell Court in January, 1985, was available to this Court when it decided in December, 1985 to approve the amendment prohibiting the inclusion of community control in that category. The State urges this Court to resolve the conflict between the District Courts of Appeal on this issue. However, this conflict has already been resolved in favor of the defendant-respondent and she urges

this Court to uphold its approval of the Guidelines amendment and affirm the Second District Court of Appeal's decision that community control is not encompassed in the Guideline's category of "any non-State prison sanction."

CONCLUSION

For the foregoing reasons, Respondent, Kimberly Mestas, requests that this Court affirm the decision of the Second District Court of Appeal.

Respectfully submitted,

J. MARION MOORMAN
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TENTH JUDICIAL CIRCUIT

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by mail to the Office of the Attorney General, Park Trammell Building, 1313 Tampa Street, 8th Floor, Tampa, Florida and to the Respondent, Kimberly Mestas, 2213 Cornell Drive, Riverview, Florida 33569 this 15th day of May, 1986.

Deborah K. Brueckheimer
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