IN THE SUPREME COURT OF FLORIDA

DONALD JEROME ATWATERS,

Petitioner,

v. CASE NO. 69,555

STATE OF FLORIDA,

Respondent.

ON DISCRETIONARY REVIEW FROM THE FIRST DISTRICT COURT OF APPEAL

BRIEF OF PETITIONER ON THE MERITS

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BRIEF OF PETITIONER ON THE MERITS

I PRELIMINARY STATEMENT

Petitioner was the defendant below and the appellant in the lower tribunal. He will be referred to as petitioner in this brief. A one volume record on appeal will be referred to as "R" followed by the appropriate page number in parentheses. A two volume transcript will be referred to as "T". Attached hereto as Appendix A is the opinion of the lower tribunal. Attached hereto as Appendix B is Section 893.135(1)(c)1, Florida Statutes.

II STATEMENT OF THE CASE AND FACTS

By information filed February 4, 1985, petitioner was charged with trafficking in more than four grams of heroin, in violation of Section 893.135(1)(c)1, Florida Statutes (R 5). The cause proceeded to jury trial on June 5-6, 1985, before Circuit Judge Donald R. Moran, Jr., and at the conclusion thereof petitioner was found guilty as charged (R 21). The arresting officer, Wayne R. Clark, testified that when petitioner was taken into custody, he retrieved a brown paper bag, which contained plastic bags with 836 oil packets inside (T 20-37). FDLE Chemist Neils Bernstein examined the various foil packets and found a total of 13.1 grams of heroin (T 49-57). He was given a total of 838 packets, of which 384 contained no controlled substance. Out of the remaining 454 packets, a group of 75 was analyzed together. One of the 75 was analyzed completely. One out of every 10 of the remaining packets was given a spot test, being a color test, which showed a purple hue indicative of an opiate, but not necessarily heroin. The group of 75 packets contained a total of 2.2 grams (T 58-64). Another group of 75 packets was analyzed. Again, only one was completely tested. One out of each of the remainder was given a test. The total weight of this group was 2.2 grams, but the chemist could only testify would certainty that .32 grams were heroin. None of the packets contained pure heroin (T 64-68).

Petitioner's timely motion for new trial (R 22) was denied on July 2, 1985 (R 24). Petitioner was adjudicated guilty and sentenced to eight years in prison, with a three year minimum mandatory, and with a $50,000 fine, which prison term was in excess of the guidelines range of 4 1/2 - 5 1/2 years, and a two-cell departure (R 25-31; T 189-98). The judge wrote the following reasons for departure on the bottom of the sentencing guidelines scoresheet:

> (A) 13.1 grams of Heroin - 14 grams would be 10 yr.min.mand.
>
> (B) 836 small foil packets.
>
> (C) On probation at time of offense.
>
> (D) PSI shows defendant was not a good probationer.

(R 29). On July 9, 1985, a timely notice of appeal was filed (R 34). On August 12, 1985, the Public Defender of the Second Judicial Circuit was designated to represent petitioner.

On appeal, petitioner argued that none of the court's four reasons for departure was valid. The court partially agreed, finding the last two reasons invalid, combining the first two reasons into one valid reason, reversing for re-sentencing, and certifying a question to this Court:

> MAY THE QUANTITY OF DRUGS INVOLVED IN A CRIME BE A PROPER REASON TO SUPPORT DEPARTURE FROM THE SENTENCING GUIDELINES.

On October 29, 1986, a timely notice of discretionary review was filed.

III SUMMARY OF ARGUMENT

Petitioner will alter the certify question somewhat and argue in this brief that the quantity of drugs cannot be used as a reason for departure. This is because the drug trafficking statute, whether it be addressing marijuana, cocaine, or heroin, sets forth specific ranges of quantities of these drugs, and assigns a mandatory minimum penalty to each range. Because the legislature has more harshly penalized a defendant, by virtue of a mandatory minimum sentence and mandatory fine, a sentencing judge cannot use that same quantity of drugs to justify a departure from the recommended guidelines sentence. This case demonstrates the fallacy of such a rationale, since petitioner's recommended guidelines sentence was less than the next-higher mandatory minimum sentence. This Court must adhere to its prior decisions, which reflect a trend of strict construction of the guidelines, and hold that the quantity of drugs cannot be a valid reason for departure, where the quantity falls within the legislative-proscribed range of punishment.

IV ARGUMENT

ISSUE PRESENTED

THE QUANTITY OF DRUGS INVOLVED IN A CRIME MAY NOT BE A PROPER REASON TO SUPPORT DEPARTURE FROM THE SENTENCING GUIDELINES, WHERE THE STATUTE PUNISHING THE CRIME PROVIDES FOR INCREASING PUNISHMENT ACCORDING TO A RANGE INVOLVING THE WEIGHT OF THE DRUG, AND THE QUANTITY OF DRUGS INVOLVED IN THIS CASE FALLS WITHIN THE LOWEST RANGE.[1]

Prior to addressing the certified question, or the modified certified question, petitioner wishes to point out a factual error in the sentencing judge's reason for departure B, which says: "836 small foil packets."[2] The evidence at trial showed that there were 836 packets seized by the police, but for some reason 838 were analyzed by the chemist. The evidence also showed that only 452 or 454 of the 836 or 838 packets contained a mixture of heroin. The other 834 contained no controlled substance. Reason B is factually incorrect. It should not be considered at all, or combined with reason A, because it has no credible factual basis and was not proven beyond a reasonable doubt. State v. Mischler, 488 So.2d 523, 525 (Fla. 1986). Thus, only one credible reason remains, that petitioner had 13.1 grams of a mixture of heroin.

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[1] As this Court can see, petitioner has chosen to modify the certified question, for reasons which will become apparent later.

[2] Erroneously referred to by the lower tribunal as "836 small full packets" (Appendix A at 2).

Turning to the statute at issue here, petitioner has produced it as Appendix B for the convenience of the court. It provides that the mere actual or constructive possession of four grams or more of a mixture containing heroin is defined as trafficking in heroin, and punished as a first degree felony. Section 893.135(1)(c), Florida Statutes. A first degree felony is punishable by a maximum of 30 years in prison or a $10,000 fine. Sections 775.082(3)(b) and 775.083(1)(b), Florida Statutes. If a defendant possesses less than four grams of heroin, he has committed only a second degree felony, with no mandatory minimum. Sections 775.082(3)(c), 775.083(1)(b)11,[3] 893.13(1)(a)1, Florida Statutes.

As in the instant case, if the amount of heroin possessed is four grams or more, but less than 14 grams, the first degree felony remains the same, but mandatory minimum penalties of three years and a $50,000 fine are created. Section 893.135(1)(c)1, Florida Statutes. If the amount of heroin possessed is 14 grams or more, but less than 28 grams, the first degree felony remains the same, but the mandatory minimum penalties are increased to 10 years and a $100,000 fine. Section 893.135(1)(c)2, Florida Statutes. If the amount of heroin possessed is 28 grams or more, the first degree felony remains the same,

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[3] Section 893.03(1) is entitled "Schedule 1".

but the mandatory minimum penalties are increased to 25 years and a $500,000 fine. Section 893.135(1)(c)3, Florida Statutes. The statute contains similar mandatory minimums for trafficking in various amounts of cannabis, cocaine, phencyclidine, and methaqualone.

On the category 6 sentencing guidelines scoresheet, a defendant who possesses less than four grams of heroin receives 65 points, for the second degree felony as the primary offense. This translates into any non-state prison sanction as the presumptively-correct disposition. But a defendant who traffics in between four and fourteen grams commits a first degree felony, with a corresponding point assessment of 137, which calls for a 3 1/2 - 4 1/2 year sentence. Such a defendant must also receive at least a three year mandatory minimum. If the defendant traffics in between 14 and 28 grams, his point total and recommended sentence remain the same, but his mandatory minimum 10 year sentence takes precedence over his 3 1/2 - 4 1/2 year range. Florida Rule of Criminal Procedure 3.701(d)(9). If he traffics in more than 28 grams of heroin, his point total and recommended sentence remain the same, but his 25 year mandatory minimum sentence takes precedence over his 3 1/2 - 4 1/2 year range. Id. Thus, the legislature and this Court, through the guidelines rule, have mandated that anyone who traffics in more than four grams of heroin

must go to prison, for at least 3 1/2 years. Moreover, the legislature has added the additional penalty of at least a three year mandatory minimum, during which the defendant cannot earn gain time of as little as 10 days or as much as 30 days per month. Section 944.275, Florida Statutes.

Since the legislature classified trafficking as a first degree felony, automatically requiring some prison time, including some mandatory minimum time, a defendant who commits the trafficking crime solely because he possesses more than four grams of heroin is already being punished for the amount of heroin involved. To use the quantity of drugs to punish him again by allowing a departure from the recommended guidelines range, which already calls for prison time, constitutes a violation of Hendrix v. State, 475 So.2d 1218 (Fla. 1985) and State v. Mischler, supra.

In Hendrix, this Court held that a defendant could not be penalized twice by first considering his prior record in assessing points on his scoresheet, and twice by considering his prior record again as a reason for departure. In Mischler, this Court held that automatic reversal is required whenever a reason for departure is based upon "factors already taken into account in calculating the guidelines score, or based upon "an inherent

component of the crime". Mischler, supra, 488 So.2d at 525.

In announcing the automatic reversal rule in Mischler, this Court modified the rule previously announced in Albritton v. State, 476 So.2d 158 (Fla. 1985), that a departure sentence may be affirmed if the state can show beyond a reasonable doubt that the invalid reason did not affect the departure decision or the length of the departure.

Petitioner's initial brief in the instant case in the lower tribunal was filed prior to Mischler. Petitioner argued on authority of Hendrix that the quantity of heroin was already factored into the scoresheet, by raising the crime from a second degree felony to a first degree felony, and so could not be used again as a reason for departure. When Mischler was decided on April 3, 1986, petitioner promptly filed a notice of supplemental authority. The lower tribunal's opinion ignored Mischler and disagreed that a Hendrix violation had occurred.

Petitioner submits that both types of Mischler automatic reversal situations exist here. An "inherent component" of trafficking is the quantity of drugs. Without the threshold amount, the crime is only possession and only a second degree felony. A "factor already taken into account" in the scoresheet is the elevation of the crime from a second degree to a first degree felony, an increase of 22 points, which automatically takes the

disposition out of the non-state prison cell and into the mandatory state prison range. Thus, the lower tribunal was totally incorrect in refusing to find a Hendrix or Mischler violation.

Petitioner's initial brief in the lower tribunal cited this Court's opinion in Santiago v. State, 478 So.2d 47 (Fla. 1985) as controlling authority. The lower tribunal's opinion does not even mention Santiago. If it had applied Santiago to reason A, it would have concluded that Santiago had already answered the certified question, for Santiago cited Hendrix and held:

> The nature and danger of possession with intent to sell a Schedule I substance is factored into the penalty recommended by the guidelines. To allow those factors to be reconsidered as an aggravation allowing departure from the guidelines is contrary to the spirit and intent of the guidelines.

Id. at 49 (emphasis added).

As noted above in footnote 2, possession of heroin is a Schedule I drug. Thus, this Court's holding in Santiago has already provided an answer to the question certified by the lower tribunal. The answer, in light of Santiago, must be No. If the lower tribunal had analyzed this case in light of Mischler and Santiago, instead of its erroneous prior decision in Mitchell v. State, 458 So.2d 10 (Fla. 1st

DCA 1984), it would have realized that Mitchell, which was an early guidelines decision, has been impliedly overruled by Mischler and Santiago.

Mitchell was convicted of possession of more than 20 grams of cannabis, a felony of the third degree. He was found in possession of an entire bale, presumably far more than 20 grams, but less than 100 pounds, the threshold quantity for the trafficking statute, which reclassified the crime as a first degree felony. The majority's interpretation of Florida Rule of Criminal Procedure 3.701 (d)(11) in Mitchell is invalid in light of this Court's later cases. While it is true that, before the guidelines, quantity was an important consideration in determining an appropriate sentence, it is now not relevant to what a trial court may do under the guidelines. Before the guidelines, trial courts had great discretion in sentencing, limited only by a few considerations, such as statutory maximum sentences. In the climate of much discretion tempered only by a few external standards, quantity was a logical and appropriate consideration in sentencing. Although the guidelines had not totally usurped judicial discretion, they have limited it and set many external standards. A quantity of drug which is inherent in a statute covered by the guidelines is not an appropriate reason to depart, even though it was an appropriate consideration before the guidelines were created. It is

logical to distinguish length of sentence by quantity of drug, but it is preguidelines logic and no longer applicable. Cf. Whitehead v. State, #67,053 (Fla. Oct. 30, 1986) (sentencing guidelines have impliedly repealed habitual offender statute).

The dissenting opinion of Judge Thompson in Mitchell makes infinitely more sense:

> While I agree with the majority that possession of a bail of marijuana should warrant a more severe sentence than possession of 21 grams, neither the guidelines nor the statute making the possession of cannabis a criminal offense provide for any distinction between possession of 20 grams and 100 pounds. I do not think we have the authority to rewrite the guidelines or the statute, nor do I think a trial judge may depart from the guidelines in the absence of clear and convincing reasons.

Mitchell, supra, 458 So.2d at 13.

To hold that the presumptive guideline sentence is inadequate to punish an activity and quantity clearly within the corners of the statute is to attack the adequacy of the guidelines generally. See Williams v. State, 492 So.2d 1308 (Fla. 1986) (trial judge's mere disagreement with guidelines not valid reason for departure). It is no more reasonable to act as though the guidelines are adequate only for the least activity, presumably mere possession of heroin, and the least quantity, four grams, and anything more supports

a departure, than it is to say that the guidelines, being adequate for the greatest amount, 28 grams, and most culpable activity, actual sale, support underdeparture for anything less. If the legislature intended to treat mere possession of heroin and actual trafficking in heroin as equally bad acts, and if the legislature chooses not to distinguish among quantities more narrowly than the 4-14 grams, 14-28 grams, or over 28 grams ranges, the judiciary may not draw distinctions which the legislature has not chosen to. There are, arguably, logical distinctions between possession and sale, and between four grams and 13.1 grams, but the legal distinctions between them are for the legislature to draw. The pragmatic issue of where to draw the line is a legislative, not a judicial, function. Judge Thompson's dissent in Mitchell, quoted above, is instructive on this point.

There is nothing to prevent the legislature or this Court from drawing finer distinctions among quantities of heroin. They could, for example, include extra points on the scoresheet based on quantity -- such as no extra points for the 4-14 gram range, x additional points for 14-28 grams, xx additional points for more than 28 grams. The legislature, the Sentencing Guidelines Commission, nor this court has done this; trial or appellate judges may not do it for them.

Allowing an amount inherent in the offense to be a reason to depart opens the door for departures based on quantity/amount in other statutes containing such ranges. The most common would probably be the grand theft statute, which covers amounts ranging from $300 to $20,000 and from $20,000 upward. Section 812.014(2)(a), 2(b)1, Florida Statutes, as amended by Ch. 86-161, Laws of Florida. Logically, there is a distinction between stealing $301 and stealing $19,999. But legally, the statute does not make this distinction. Using the quantity of drugs as an analogy, any time a defendant stole $3,000, or ten times the minimum, there would be a reason to depart. The grand theft statute has not been so construed. Dawkins v. State, 479 So.2d 818 (Fla. 2d DCA 1985) and Knowlton v. State, 466 So.2d 278 (Fla. 4th DCA 1985).

These arguments point out the greatest pitfall of basing departure on quantity, which is simply that it is too subjective. The guidelines are supposed to be objective and lead to uniform sentences. How would a trial court decide the appropriate extent of departure for a quantity of heroin? Is it a one cell increase for ten grams, or a two cell increase for 20 grams, or a three cell increase for 30 grams?

Other appellate courts have struggled over this question. Guerrero v. State, 484 So.2d 59 (Fla. 2d DCA 1986) (965 grams

of cocaine a permissible ground for departure); Mullen v. State, 483 So.2d 754 (Fla. 5th DCA 1986) (possession of 13.8 grams of cocaine a permissible ground for departure); Pursell v. State, 483 So.2d 93 (Fla. 2d DCA 1986) (1,952 grams of cocaine permissible ground for departure); Irwin v. State, 479 So.2d 153 (Fla. 2d DCA 1985) (quantity unstated but permissible ground for departure, citing Smith v. State, 454 So.2d 90 (Fla. 2d DCA 1984); Benitez v. State, 470 So.2d 734 (Fla. 2d DCA 1985) (quantity not stated but permissible ground for departure); Jean v. State, 455 So.2d 1083 (Fla. 2d DCA 1984) (two pounds of marijuana permissible ground for departure because far more than 20 grams necessary for conviction); and Seastrand v. State, 474 So.2d 908 (Fla. 5th DCA 1985) (2,000 "hits" of LSD, questionable validity in light of Santiago). Compare these cases with Jiminez v. State, 486 So.2d 36 (Fla. 2d DCA 1986) (one ounce equalling approximately 28.35 grams of cocaine not permissible ground for departure as being a deminimus excess over the minimum necessary to convict of trafficking); and Gallo v. State, 483 So.2d 876 (Fla. 2d DCA 1986) (43.5 grams of cocaine not permissible ground for departure).

Petitioner maintains, based upon the preceding argument, that the best answer to the certified question would be an unqualified NO. However, it could be answered with a qualified yes, without doing violence to Mischler or Hendrix

or Santiago. If departure is to be allowed based upon the quantity of drugs, it should be limited only to the situation, such as occurred in Guerrero and Pursell, where the quantity of drugs far exceeds the amount that the legislature has given as the "outer limit" of the range, i.e., more than 10,000 pounds of cannabis, or more than 400 grams of cocaine, or more than 28 grams of heroin, or more than 400 grams of PCP, or more than 25 kilograms of methaqualone. Such a departure could be justified by the preguidelines logic addressed above. But where the legislature has already provided a range of quantities, and the defendant falls within that range, whether close to the lower amount or close to the higher amount, departure cannot be sanctioned because the weight is already included in the degree of the crime and its corresponding penalties. Only where the quantity far exceeds the quantity which calls for the most serious penalty would departure beyond the recommended guidelines sentence be appropriate.

The lower tribunal seems to have recognized this distinction in the curious decision of Newton v. State, 490 So.2d 179 (Fla. 1st DCA 1986).[4] In that case the defendant

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[4]The decision is curious because it predated petitioner's opinion by four months, but was not cited in petitioner's opinion. Only Judge Barfield was common to both the Newton panel and the instant panel.

was convicted of trafficking in 170 grams of cocaine, which amount falls within the least serious type of trafficking. The judge doubly departed from the recommended guidelines sentence and imposed an 18 year sentence, because 170 grams was very close to the 200 gram limit for this type of trafficking. The lower tribunal held that this was an improper reason, because the "outer limit" for trafficking in cocaine is not 200 grams, but rather more than 400 grams, which is the most serious category of trafficking in cocaine:

> Therefore, 170 grams of cocaine is not at the outer limit of the offense of trafficking which contemplates amounts much greater than 400 grams.
>
> * * *
>
> Newton's offense clearly falls within the first division of the cocaine trafficking category [28-200 grams]. The lower court here refers to the legislative intent that every increasing amounts of cocaine are tantamount to aggravating factors. We disagree and find the amount here to be within the recommended category.

Id. at 181. Newton's 170 grams is 6.1 times the minimum quantity required (28 grams) for his crime. Petitioner's 13.1 grams is 3.3 times the minimum quantity (4 grams) required for his crime. If quantity is really so important, why did the lower tribunal uphold petitioner's departure while reversing Newton's departure where Newton's culpability was almost twice as much as petitioner?[5] This

[5]The extent of the guidelines departure is about the same in both cases, i.e., double, if one looks at the number of years. If cells are examined, Newton's departure was three cells and petitioner's departure was two cells.

analysis shows the absurdity of focusing on quantity when that amount falls within the range of weights that the legislature has employed in defining the crime. Only if the amount far exceeds the "outer limits" of the crime should departure on the basis of weight be permitted.

Any other construction would be illogical and contrary to the letter and spirit of the guidelines. Unless and until the legislature amends the drug trafficking statute to narrow the ranges of the quantity of drugs, or to reclassify the degree of the crimes, this Court is powerless to impute more serious penalties to a defendant whose quantity of drugs falls within the proscribed range of weights. Unless and until this Court and the legislature amend the scoresheets to provide increasing point assessments before increasing quantities of drugs, the amount of the drug cannot be used as a reason for departure unless it far exceeds the "outer limit" of the crimes as defined by statute. This Court must answer the certified question in the negative; or, in the alternative, answer in the affirmative, but only where the quantity of drugs far exceeds the "outer limit" of the offense.

V CONCLUSION

Based upon the foregoing argument, reasoning, and citation of authority, petitioner requests that this Court declare reasons for departure A and B to be invalid, vacate his eight year departure sentence, and remand for resentencing within the 4 1/2 - 5 1/2 year range.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by hand delivery to Mr. Raymond L. Marky, Assistant Attorney General, The Capitol, Tallahassee, Florida, and a copy has been mailed to petitioner, Mr. Donald Jerome Atwaters, #284668, Lawtey Correctional Institution, Post Office Box 229, Lawtey, Florida, 32058, this 6 day of November, 1986.

P. Douglas Brinkmeyer

P. DOUGLAS BRINKMEYER