IN THE SUPREME COURT OF FLORIDA

CHARLES KOOPMAN,	)	
	)	
Appellant,	)	
	)	
v.	)	Case No. 70,588
	)	
STATE OF FLORIDA,	)	
	)	
Appellee.	)	
	)	

DISCRETIONARY REVIEW OF THE DECISION OF THE
SECOND DISTRICT COURT OF APPEAL
STATE OF FLORIDA

Petitioner's BRIEF OF ~~APPELLEE~~ ON THE MERITS

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PRELIMINARY STATEMENT

CHARLES KOOPMAN will be referred to as the "Appellant" or as he stood before the trial court or on direct appeal in this brief and the STATE OF FLORIDA will be referred to as the "Appellee" or "State". The Record on Appeal will be referenced by the symbol "R" followed by the appropriate page number.

STATEMENT OF THE CASE AND FACTS

The Appellant was charged with possession of cocaine in violation of Florida Statute §893.13(1)(e); delivery of cocaine from a person over the age of 18 to a person under the age of 18 in violation of Florida Statute §893.13(1)(c); and delivery of cocaine into the State of Florida in violation of Florida Statute §893.13(1)(d). On August 29, 1986, the Appellant pled guilty to above referenced crimes. The Appellant's guidelines' scoresheet totaled 151 points with a recommended sentencing guidelines' range of four and a half to five and a half years in the Florida State Prison. The trial court departed from the sentencing guidelines recommended range, and sentenced the Appellant to fifty years. The court filed written reasons for this departure, alleging that the defendant involved a child and former student, that the Appellant abused his position of trust, and the amount of drugs involved. The amount of cocaine involved in the instant case was 24 grams.

Appellant then prosecuted a direct appeal to the Second District Court of Appeals in and for the State of Florida, and pertinent to this instant certified question, raised the issue, "WHETHER THE TRIAL COURT ERRED IN DEPARTING FROM THE SENTENCING GUIDELINES UPON SENTENCING THE APPELLANT?"

In its opinion, Koopman v. State, No. 86-2407 (Fla. 2d DCA, May 22, 1987) [12 F.L.W. 1257], the Second District Court of Appeal found that the trial court did not present clear and convincing reasons for departing from the presumptive guidelines

range. The court found that the fact that a child was involved in the transaction was an inherent component of the crime of delivery of a controlled substance to a child under the age of 1^ years of age and therefore, may not be used to justify such a departure. The district court further found that there was no breach of trust involved since, in fact, the Appellant had resigned from his teaching position several months prior to committing the offense. Regarding the final reason the trial court gave for the instant departure, i.e., the amount of drugs involved (24 grams), the Second District Court of Appeal certified the following question to this Honorable Court:

> MAY THE QUANTITY OF DRUGS INVOLVED IN POSSESSION OR DELIVERY OF COCAINE BE USED AS A PROPER REASON TO SUPPORT A VALID DEPARTURE FROM THE SENTENCING GUIDELINES?

Pursuant to that opinion, Appellee herein filed its notice to invoke this Court's discretionary review pursuant to Fla. R. App. P. 9.030(2)(A)(v). Thereafter, the Second District Court of Appeal issued its order staying the mandate in the above styled cause pending resolution of the certified question in this Honorable Court.

SUMMARY OF THE ARGUMENT

A departure from the recommended sentencing range under the sentencing guidelines should be valid based on the amount of drugs possessed where the quantity of the drug possessed exceeds the amount necessary for conviction.

ARGUMENT

ISSUE I

MAY THE QUANTITY OF DRUGS INVOLVED IN POSSESSION OR DELIVERY OF COCAINE BE USED AS A PROPER REASON TO SUPPORT A VALID DEPARTURE FROM THE SENTENCING GUIDELINES? (As certified to this Court by the Second District Court of Appeal, State of Florida).

In its opinion in the instant case, Koopman v. State, No. 86-2407 (Fla. 2d DCA, May 22, 1987) [12 F.L.W. 1257], the Second District Court of Appeal stated:

> "The minimum amount required for a conviction of trafficking in cocaine is 28 grams. Thus, possession and delivery of cocaine are offenses involving only up to 28 grams, where as trafficking in cocaine is an offense involving 28 or more grams of the drug. §893.135(b), Florida Statutes (1985).
>
> While the legislature saw fit to fix the penalties for possession and delivery of cocaine regardless of amount, §893.13(e) and §893.13(d)(1), Florida Statutes (1985), it has provided for an increase of the severity of the penalties for trafficking in cocaine according to amount. §893.135(b), Florida Statutes (1985). The fact that neither the guidelines nor the statute making possession or delivery of cocaine a criminal offense provides for any distinction between possession or delivery of 1 gram or up to 28 grams indicates that amount of drugs would be an invalid reason for departing from a recommended guidelines sentence for either offense. (citations omitted)
>
> We note that the severity of the penalties for trafficking in cocaine only increases at 200 and 400 grams. §893.135(b), Fla. Stat. (1985). Because of the excessive amount of cocaine necessary before the trafficking penalty changes, this Court has upheld departure sentences based on amounts of cocaine well above the threshold amounts for each penalty especially when the amounts have

> been well above the 400 gram level. See, Pursell v. State, 483 So.2d 94 (Fla. 2d DCA 1986). In contrast because the range in amount of cocaine involved in the offenses of possession and delivery is so narrow, the same reasoning does not apply to sentences for those offenses.

Florida Rule of Criminal Procedure 3.701(b) states in part: "The primary purpose of sentencing is to punish the offender. Rehabilitation and other traditional considerations continue to be desired goals of the criminal justice system but must assume a suboordinate role." Fla. R. Crim. P. 3.701(b)(2). The rule further states: "While the sentencing guidelines are designed to aid the judge in the sentencing decision and are not intended to usurp judicial discretion, departures from the presumptive sentences established in the guidelines shall be articulated in writing and made only for clear and convincing reasons." Fla. R. Crim. P. 3.701(b)(6). Referring to the above portions of the rule stated, the court in Higgs v. State, 455 So.2d 451 (Fla. 5th DCA 1984), said: "If as this rule indicates, judicial discretion still plays a part in the sentencing process, an appellate court should not reverse a sentence which departs from those guidelines absent a showing of an abuse of that discretion . . ." Id. at 453.[1]

1/ In the instant case, notwithstanding any allegations by the Appellant of the trial court's abuse of its discretion in the length of the departure, (See, Traver v. State, (Fla. 2d DCA, Feb. 27, 1987) [12 F.L.W. 590], regardless of this Honorable Court's determination of the instant certified question, the Appellant's case will be remanded for resentencing under the dictates of Albritton v. State, 476 So.2d 158 (Fla. 1985) because

The State would urge that in the instant case it is clear that the amount the Appellant possessed far exceeded the amount necessary for conviction. Cases eminating from several district courts disagree with this assertion. See, Garcia v. State, No. 85-1167 (Fla. 3d DCA, March 24, 1987) [12 F.L.W. 848], Pastor v. State, 498 So.2d 962 (Fla. 4th DCA 1986), Pursell v. State, 483 So.2d 94 (Fla. 2d DCA 1986), Welker v. State, No. BN-105 (Fla. 1st DCA, April 10, 1987) [12 F.L.W. 918]. However, in Mitchell v. State, 485 So.2d 10 (Fla. 1st DCA 1984), reversed on other grounds, Whitfield v. State, 487 So.2d 1045, the defendant was charged with conspiracy to traffick in cannabis, and possession of cannabis. He was acquitted on the conspiracy to traffick charges and convicted of possession of more than 20 grams of cannabis. One of the reasons for the departure sentence in Mitchell was that the defendant possessed an entire bale of marijuana. The First District Court of Appeal found this to be a valid reason for departure upon conviction of possession of cannabis in excess of 20 grams. (A dissenting opinion by Judge Thompson stated that the courts could not change either the statute or the guidelines and that the penalties for possession does not change if 5 pounds, 10 pounds or even 100 pounds are possessed, but only when it exceeded 100 pounds would the penalty increase.) Although Appellee would concede that Jean v. State, 455 So.2d 1083 (Fla. 2d DCA 1984) is of limited value since the

opinion in the instant case was issued, see, Koopman v. State, supra, in Jean, the defendant pled no contest to two counts of delivery and possession of marijuana. The recommended guidelines sentence was any non-state prison sanction. One of the several reasons given for the departure sentence of two years incarceration was that the defendant possessed two pounds of marijuana "far exceeding the 20 grams necessary for felony possession" Id. at 1084. The district court responded to the issue stating: "The determination of a defendant's sentence has always been within the discretion of the trial court, and a promulgation of the guidelines was not intended to supercede this principle" Id. at 1084, and that "defendant cannot minimize how much the amount he possessed exceeds the amount necessary for conviction" Id at 1085. Again in Seastrand v. State, 474 So.2d 908 (Fla. 5th DCA 1985) the defendant was convicted of unlawful sale or delivery of LSD. The amount involved, per the court, would have provided two thousand "hits" of LSD. The trial court departed from the recommended sentence range finding that the guidelines treated one dosage and two thousand dosages as the same. The Fifth District Court of Appeal found the trial court's departure based on clear and convincing reasons.

Although the district courts appear to have no doubt in affirming departures in trafficking cases where the amount far exceeds that necessary for conviction, because of the penalty increases throughout the trafficking statutes, Appellee would urge that same reasoning is applicable to cases where the

conviction is obtained for possession. See, Irwin v. State, 479 So.2d 153 (Fla. 2d DCA 1985), Atwater v. State, 495 So.2d 219 (Fla. 1st DCA 1986), Pastor v. State, 498 So.2d 962 (Fla. 4th DCA 1986). (But, compare Newton v. State, 490 So.2d 179 (Fla. 1st DCA 1986) where a departure was found invalid for possession of 170 grams of cocaine, 30 grams short of the increased penalty of possession of 200 grams.) The Appellee would urge that Seastrand, supra, is controlling herein and that this court should resolve the certified question in accord with Seastrand. The Appellant in the instant case possessed 24 grams of cocaine, 4 grams under the trafficking amount. Appellee would urge that the guidelines do not strip a court of its discretionary function in sentencing when the amount of drugs possessed so clearly exceeds the amount necessary for conviction; and in fact, reaches the outer limits of the range of the crime for which he was convicted.

CONCLUSION

WHEREFORE, based on the foregoing arguments and citations of authority, the State would request that this Honorable Court answer the certified question in the affirmative.

Respectfully submitted,

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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. mail to Daniel M. Hernandez, Esquire, 902 N. Armenia Avenue, Tampa, Florida 33609, this 18th day of June, 1987.

OF COUNSEL FOR APPELLEE