IN THE SUPREME COURT OF FLORIDA

CHARLES KOOPMAN,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

CASE NO. 70, 588

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

REPLY BRIEF OF APPELLANT

DANIEL M. HERNANDEZ, ESQUIRE
DANIEL M. HERNANDEZ, P.A.
902 N. Armenia Avenue
Tampa, Florida 33609
(813) 875-9694

COUNSEL FOR APPELLANT

TABLE OF CONTENTS

TABLE OF CITATIONS

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 pape number.

STATEMENTS 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 the above-referenced crimes. The Appellant's guidelines' scoresheet totalled 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 persumptive 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 18 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 rejected that reason as well, but in light of the diversity of opinions among the Districts, 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

The quantity of drugs involved in possession or delivery of cocaine should not be used as a proper reason to support a valid departure from the Sentencing Guidelines.

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).

The amount of cocaine involved in the instant case (approximately 24 grams) was under the amount for a trafficking charge. Assuming no prior record or other charges, possession and delivery of that amount calls for any non-state prison sanction under the Sentencing Guidelines while simple possession over 8 grams adds up to a three and a half to a four and a half year prison sentence with a three-year minimum mandatory sentence. This sufficient difference would lead one to believe that the Florida Legislature chose twenty-eight grams (1 ounce) as the cut-off amount for good reasons. One likely reason is that an ounce or more indicates an experienced dealer as opposed to someone possessing generally for personal use or small-time transactions.

Appellant would propose that answering the certified question in the affirmative would create arbitrary decisions as to what constitutes a large amount within the one to twenty-eight gram range. Is ten grams a large amount? Should it exceed twenty grams? Should it be closer to twenty-eight grams such as over 26.5? Appellant would argue that quantity of drugs involved is an invalid reason for departure because quantity is an inherent component of the offense which has already been factored in the Guidelines score. State v. Mischler, 488 So.2d 523 (Fla. 1986); Hendrix v. State, 475 So.2d 1218 (Fla. 1985); Newton v. State, 490 So.2d 179 (Fla. 1st DCA 1986).

Appellee relies heavily on Seastrand v. State, 474 So.2d 908 (Fla. 5th DCA 1985). It should be noted that Seastrand involves a very large amount of LSD and, as the Court pointed out, the Guidelines totally ignore the amount involved. This is not the case with cocaine which has a clear-cut breakdown of escalating sentences based on amount up to over 400 grams. Accordingly, Appellant would contend that upward departure due to the amount of drugs should be allowed only when a sufficient deviation from the standard occurs (i.e. well over 400 grams of cocaine), such as Guerrero v. State, 484 So.2d 59 (Fla. 2nd DCA 1986) which involved 965.4 grams and Pursell v. State, 483 So.2d 94 (Fla. 5th DCA 1986) (1,952.5 grams of cocaine). At the very least, it should only apply to trafficking cases as suggested in Garcia v. State, No. 85-1167 (Fla. 3d DCA, March 24, 1987)(12 Fl.L.W. 848).

Appellant would submit that the Second District Court of Appeal in Koopman v. State, No. 86-2407 (Fla. 2d DCA, May 22, 1987)(12 F.L.W. 1257), properly reason that:

> 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 in so narrow, the same reasoning does not apply to sentences for those offenses.

Consequently, the quantity of drugs involved in possession or delivery of cocaine should not be used as a proper reason to support a valid departure from the Sentencing Guidelines and the certified question should be answered in the negative.

CONCLUSION

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

Respectfully submitted,

DANIEL M. HERNANDEZ, ESQUIRE
DANIEL M. HERNANDEZ, P.A.
902 N. Armenia Avenue
Tampa, Florida 33609
(813) 875-9694
Attorney for Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished to ERICA M. RAFFEL, ESQUIRE, Assistant Attorney General, 1313 Tampa Street, Suite 804, Park Trammell Building, Tampa, Florida 33602, by U.S. Mail, on the 26th day of June, 1987.

DANIEL M. HERNANDEZ, ESQUIRE