IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v. CASE NO. 70,788

LEROY STANLEY,

Respondent.

_____/

PETITIONER'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner, State of Florida, prosecuting authority at trial and appellee in the Fifth District Court of Appeal, will be referred to herein as the "state."

Respondent, LEROY STANLEY, who was the defendant in criminal trial proceedings held in the Circuit Court of the Seventh Judicial Circuit, in and for Volusia County, Florida, and the appellant in the district court of appeal, will be referred to as "Stanley" or "defendant."

The symbol "R" refers to the record-on-appeal before the Fifth District Court of Appeal.

STATEMENT OF THE CASE AND FACTS

Defendant was charged by information on November 21, 1984, with one count of unlawful possession of a controlled substance, to wit: Cannabis, in a quantity exceeding twenty (20) grams in violation of section 893.13(1)(e), Florida Statutes (1983). Defendant pled guilty to that charge on November 4, 1985, and appeared for sentencing on April 25, 1986. According to the prepared guidelines scoresheet, defendant's recommended guidelines sentence was any non-state prison sanction (R 25). Defendant was adjudicated guilty and sentenced to three years in state prison to be followed by two years probation (R 4, 27-31). The sentencing judge properly filed a written reason for the departure which contained a statement of fact that defendant possessed two dufflebags containing a total of 103 pounds of cannabis. The order states that the court found that the quantity of cannabis involved was a clear and convincing reason to sentence defendant outside the guidelines (R 26).

Appellate counsel for the state, after receiving defendant's initial brief on direct appeal, noticed that the information charged defendant with possession of 99 pounds of cannabis and moved the district court of appeal to relinquish jurisdiction to the trial court so that the discrepancy between the amount of cannabis stated in the order of departure and the amount stated in the charging document could be corrected or explained. The motion was granted and the circuit court supplied a supplemental record consisting of a transcript of the defendant's plea hearing of November 4, 1985. That transcript revealed the explanation

for the above mentioned inconsistency: The factual basis proffered by the state (R 43-44), provided that when the two bags of cannabis were originally seized and weighed, the total weight thereof was 103 pounds, but once all wrappings were removed and only the cannabis was weighed, the amount equaled 99.25 pounds. The circuit court, upon relinquishment, filed another order setting forth its reason for imposing a departure sentence which included the correct amount of 99 pounds of cannabis.

In its decision, Stanley v. State, 507 So.2d 1133 (Fla. 5th DCA 1987), a divided Fifth District Court of Appeal held that the quantity of drugs was not a valid basis for departure and reversed Stanley's sentence certifying conflict with Mitchell v. State, 458 So.2d 10 (Fla. 1st DCA 1984).

SUMMARY OF ARGUMENT

The decision of the Fifth District below should be quashed. The state submits that the sentencing judge did not err in exceeding the recommended guidelines range and imposing a three year sentence, due to the fact that respondent was .751 of a pound short of being subject to a three year minimum mandatory sentence and a $25,000 fine. That defendant had over 99 pounds of marijuana was not necessarily factored into the scoresheet where the only inherent component of the crime for which defendant was sentenced that pertains to the amount is 20 grams. The quantity of contraband possessed by defendant, Stanley, is an appropriate and valid basis for a guidelines departure sentence, as other district courts of appeal have so recognized. That factor is entirely consistent with the stated purpose of the guidelines to tailor punishment to fit the severity of the crime and thus allow departures based on particular circumstances of the convicted offense. When the legislature set minimum mandatory sentences which increased as the quantity of drugs increased, it indicated its intent to punish more severely defendants possessing or trafficking in greater amounts of drugs. This conclusion is in accord with the decisions of many Florida appellate courts.

This issue is currently before this court in Atwaters v. State, Case No. 69,555 and Pastor v. State, Case No. 68,879. Although both of these cases involve convictions for trafficking in cocaine rather than possession of cannabis as in the instant case, it is anticipated that the decisions in those cases will be

controlling in this case.

ISSUE ON CERTIORARI

ARGUMENT

MAY THE QUANTITY OF DRUGS INVOLVED IN THE COMMISSION OF AN OFFENSE BE USED AS A REASON TO IMPOSE A SENTENCE WHICH DEPARTS FROM THE SENTENCING GUIDELINES.

The defendant, Leon Stanley, was charged with a violation of section 893.13(1)(e), Florida Statutes (1983), which makes it unlawful to possess a controlled substance and is a felony of the third-degree. One is guilty of this offense if one possesses merely a bit over 20 grams of the controlled substance, since possession of "not more than twenty grams of cannabis" is a misdemeanor of the first-degree. § 893.13(1)(f), Fla. Stat. (1983). One in possession of over 100 pounds of cannabis is guilty of "trafficking", a first-degree felony. The statute does not draw any particular distinction with regard to the degree of the offense, or penalty, based on amounts between 20+ grams and 100 pounds. The penalty provided by statute for the offense for which the defendant was convicted is imprisonment for a term not exceeding 5 years. § 775.082, Fla. Stat. (1983). Stanley scored 42 points on his guidelines scoresheet resulting in a recommended sentence of "any non-state prison sanction." Based upon the fact that he had possessed such a large quantity of marijuana, 99.25 pounds (just short of the trafficking amount of 100 pounds and its 3 year minimum mandatory sentence), the trial judge departed from the guidelines and imposed a 3 year term in state prison followed by 2 years probation.

It is obvious that the three year sentence received by defendant is less severe than a three year minimum mandatory sentence since defendant is eligible to earn gain time. He was able to avoid the three year minimum mandatory sentence because he possessed slightly less than 100 pounds of marijuana, but under the guidelines his recommended sentence was the same as if he possessed less than three-quarters of an ounce. The sentencing judge reasonably found that defendant should receive more punishment for the large quantity of cannabis, yet less punishment than one who possessed more than 100 pounds, or the trafficking amount, would receive. The state argues that the reason for imposing the split sentence and departing from the guidelines is a valid one permitted by the guidelines.

Possessing an amount of drugs which greatly exceeds the threshhold amount necessary to obtain a third-degree felony conviction is an appropriate departure factor that is entirely consistent with Florida Rule of Criminal Procedure 3.701(b)(3), which states: "The penalty imposed should be commensurate with the severity of the convicted offense and the circumstances surrounding the offense." (Emphasis added). Inasmuch as a higher quantity of drugs increases the severity of the offense, Committee Note (d)(11) to Rule 3.701, permits utilization of that factor as a reason for departure. That note provides: "Other factors, consistent and not in conflict with the Statement of Purpose, may be considered and utilized by the sentencing judge. Thus, if a factor relied upon by a sentencing judge is consistent with and not in conflict with any one of the

principles set forth in Rule 3.701(b), the Statement of Purpose, then Committee Note (d)(11) expressly approves consideration of and utilization of the quantity of drugs as a factor in departing from a guidelines sentence.

This court has recently relied on the principles espoused in Rule 3.701(d)(3) to support departure reasons in non-drug cases which are applicable by analogy here. In Vanover v. State, 498 So.2d 899 (Fla. 1986), the defendant, Vanover, was convicted of aggravated battery for shooting a visitor to his home in the arm. Vanover was found not guilty of shooting the visitor's brother in the mouth. Aggravated battery is a second-degree felony punishable by a maximum of 15 years. The guidelines sentence calculated for Vanover, recommended a maximum sentence of 30 months incarceration. Because the aggravated battery was committed with a firearm, the three year minimum mandatory was held to take precedence over the 30 months recommendation. Fla. R. Crim. P. 3.701(d)(9). The trial judge departed from the guidelines beyond the three year minimum mandatory and imposed a sentence of 10 years. One of the five reasons for departure reviewed by this court was: "This was a particularly aggravated set of circumstances which sets this case far and above the average Aggravated Battery." Recognizing this court's ability to "flesh-out factual support" for this reason in the record, this Court upheld that reason on the following rationale:

> Noting that Florida Rule of Criminal Procedure 3.701(b)(3) allows departure based on "the circumstances surrounding the offense", and that the record on appeal in this case amply

> illustrates sufficient facts rendering the crime a highly extraordinary and extreme incident of aggravated battery, we find the reason a clear and convincing reason for departure in this case.

Vanover, supra, at 615.

In a sexual battery context, this Court held that excessive brutality could be a valid reason for departure, as well as the fact that the defendant committed two separate acts of sexual battery. Lerma v. State, 497 So.2d 736 (Fla. 1986). This court's rationale for approving those reasons for departure in Lerma, supra, was set forth in 3.701(b)(3), that the penalty imposed be commensurate with the severity of the offense and the circumstances surrounding it. This Court also relied on Rule 3.701(b)(3) in upholding as a clear and convincing reason for departure, the fact that a sexual battery victim's son witnessed the brutal sexual violation of his mother. Casteel v. State, 498 So.2d 1249 (Fla. 1986). This fact evidenced more than the "normal" emotional trauma associated with sexual offenses.

The sentencing guideline rationale which has persuaded this court in the past to approve departures due to "excessive" aggravated battery, "excessive brutality" in a sexual battery offense, "extraordinary" emotional trauma resulting from a sexual battery, and an "aggravated" sexual battery that was factually premised on more than one requisite act of sexual battery, should clearly support a departure from the recommended guideline sentence in the case sub judice, where the quantity of drugs is more than 1588 times the threshhold amount required for the third-degree felony conviction.

Florida Rule of Criminal Procedure 3.701(b)(3), in conjunction with Committee Note (d)(11), applies to drug cases as readily as it applies to sexual battery and aggravated battery cases. Although the Fifth District Court of Appeal in the instant case held that the excessive quantity of drugs was not a valid reason for departure and relied upon the dissenting opinion in Mitchell v. State, 458 So.2d 10, 13 (Fla. 1st DCA 1984), rev. denied, 464 So.2d 556 (Fla. 1985), it certified conflict with the decision in Mitchell (see Appendix), which is one of a number of district court decisions that have relied on the principles in Rule 3.701(b)(3), to approve upward departures based on the large quantity of drugs involved. The following Florida district court of appeal decisions have all recognized that the amount of drugs involved is an appropriate factor relating to sentencing for the convicted drug offense: Birchfield v. State, 497 So.2d 945 (Fla. 1st DCA 1986) ("the amount of marijuana", is a valid reason); Atwaters v. State, 495 So.2d 1219 (Fla. 1st DCA 1986) ("when quantity of contraband is used as a reason for departure, that reason is not necessarily a duplication of factors already taken into account in arriving at the guidelines score since the guidelines do not specifically factor in the quantity element due to the broad range of each statutory prohibition."); Coleman v. State, 491 So.2d 1292 (Fla. 2d DCA 1986) (the quantity of cocaine involved, 1,000 grams, is a valid reason for departure); Guerrero v. State, 484 So.2d 59 (Fla. 2d DCA 1986) (transaction involving 965.04 grams of cocaine was proper reason for departure where defendant charged with trafficking in over 400 grams of cocaine);

Mullen v. State, 483 So.2d 754 (Fla. 5th DCA 1986) (found that no error exists as to the first reason for departure which focuses on, inter alia, the amount of drugs involved. The quantity of drugs involved in a crime has also been held to be a proper reason for departure even though it is an element of the convicted offenses). Mitchell, supra, (over 20 grams needed for conviction, amount possessed was an "entire bale" of marijuana). Such decisions are not limited to permitting reliance on large quantities of drugs as a basis for upward departure, but allow reliance on smaller quantities as a basis for downward departure sentences. In State v. Villalovo, 481 So.2d 1303 (Fla. 3d DCA 1986), the defendant had only one-half gram of cocaine, subjecting him to a five year maximum, however, his prior record increased his points, such that his recommended guidelines sentencing range was 22-27 years. Rather than impose the five year maximum sentence for possession of cocaine, the judge focused on the small amount of cocaine, cited to Irwin v. State, 479 So.2d 153 (Fla. 2d DCA 1985), and imposed a sentence of five years probation subject to 18 months community control. If a small quantity of cocaine can decrease the severity of the offense such that a lighter sentence is more commensurate with the particular offense, then logically, the converse must be true.

The district courts seem to have had little trouble in determining that excessive amounts of drugs which reach the outer-most ranges of the parameters needed for conviction, or that go way beyond the minimum amount of drugs required for a

are appropriate considerations for sentencing departures. Even in cases where departure has ultimately been held to be unwarranted, such has been done in sole consideration of the amount of drugs involved. Jimenez v. State, 486 So.2d 36 (Fla. 2d DCA 1986) (over 28 grams required for conviction, amount possessed 28.35 grams; invalid as basis for departure); Pedraza v. State, 493 So.2d 1122 (Fla. 3d DCA 1986) (over 400 grams required for conviction, 468 grams involved; invalid as basis for departure); Colvin v. State, 501 So.2d 118 (Fla. 2d DCA 1987) (between 20 and 200 grams required for conviction, amount involved 56 grams; invalid as basis for departure). These decisions clearly and consistently appear to support the trial court's departure in the instant case.

When the legislature set minimum mandatory sentences for trafficking which increased as the quantities of drugs increased, it indicated its intent to punish more severely defendants trafficking in greater amounts of drugs. The fact that it chose broad quantity categories for imposition of the mandatory minimum sentence, and for the offense of possession of a controlled substance did not likewise indicate an intent that the total sentences imposed in each category be identical. Thus, because the legislature imposed the same five year maximum sentence on a defendant possessing more than 20 grams of cannabis, as on one possessing nearly 100 pounds, did not mean the trial judge could not rely upon Florida Rules of Criminal Procedure 3.702(d)(3), to impose a greater total sentence due to the increased severity of the crime. The fact that the defendant here possessed 99.25

pounds of cannabis was not factored into the scoresheet which accounted for only 20 + grams, and was not an inherent component of the crime of possession. In fact, the statute which defendant was found to have violated, section 893.13(1)(e), Florida Statutes (1983), does not provide any specific amount in order for a conviction. It can only be assumed by looking at the limits provided in section 893.13(1)(f), Florida Statutes (1983), that to be guilty of violating section 893.13(1)(e), one must possess over 20 grams of cannabis. Although one could be found guilty of the special crime of "trafficking" if in possession of over 100 pounds of cannabis, possession of more than 100 pounds does not preclude one from being charged with and convicted of mere possession under section 893.13(1)(e). In such a case, without the discretion to impose a departure sentence based on quantity, the courts would be forced to impose the same sentence for possession of 20.0001 grams as it would for 99.99 pounds, or even 10,000 pounds. Where it is clear that the legislature intended to punish more severely for increased amounts, a trial court should be permitted the discretion to impose sentences which carry out that purpose.

Specific amounts involved in a given case are certain to vary from case to case. As noted in Atwaters, supra, at 1211, a given aggravated amount of drugs present in a given case is not reflected at all, let alone in every given case. It is contrary to the entire structure and purpose of the drug possession and trafficking statute, as well as the sentencing guidelines, to suggest that the amount of drugs present, be they astronomical or

miniscule, is a "common ingredient" that should necessarily result in the same or similar treatment in every single case. The goals of punishment and deterrence evident in both the drug possession and trafficking statutes, State v Benitez, 395 So.2d 514, 517 (Fla. 1981), are entirely consistent with such goals of the guidelines. It is completely foreign to the concept of criminal punishment that those defendants, such as Stanley, who possess more than 1,000 times the statutory minimum amount required for conviction, cannot be punished to a greater degree than those who possess the bare minimum. To not accept the state's position and to reduce the amount of drugs possessed in a given case to irrelevance in the sentencing process would substantially diminish the punitive and deterrent effects of punishment for drug possession in general, and will encourage possession and the prerequisite sale of higher quantities of cannabis if the punishment is not permitted to be tailored to the crime.

The appellate courts have demonstrated a conscientious capability to employ and apply a "de minimus/far in excess" litmus test on a case-by-case basis to both invalidate and validate "quantity of drugs" sentencing departures. Pedraza; Villalova; Guerrero; Mitchell; and Seastrand v. State, 474 So.2d 908 (Fla. 5th DCA 1985). They should be allowed to continue.

CONCLUSION

The decision of the trial court to depart from the sentencing guidelines in the instant case, for the reason that the quantity of drugs was excessive, was consistent with previous holdings of all other district courts of appeal on this issue, as well as with prior decisions of the Fifth District itself. The instant decision, which represents a departure from all of the above, should be quashed.

WHEREFORE, petitioner respectfully urges this honorable court to quash the decision below and to remand with instructions consistent herewith.

Respectfully submitted,

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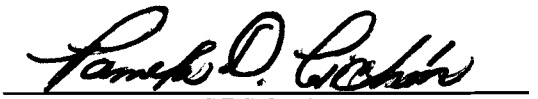

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing Petitioner's Brief on the Merits and Index to Appendix has been furnished by mail to Michael S. Becker, 112 Orange Avenue, Suite

A, Daytona Beach, Florida 32014, counsel for the respondent, this 24th day of August, 1987.

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