IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

vs. CASE NO. 70,883

JUAN OSCAR DOMINGUEZ,

Respondent.

_____/

ON DISCRETIONARY REVIEW FROM THE
FIRST DISTRICT COURT OF APPEAL

RESPONDENT'S BRIEF ON THE MERITS

MICHAEL E. ALLEN
PUBLIC DEFENDER

P. DOUGLAS BRINKMEYER #197890
ASSISTANT PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT
POST OFFICE BOX 671
TALLAHASSEE, FLORIDA 32302
(904) 488-2458

ATTORNEY FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF CITATIONS

TABLE OF CITATIONS
(continued)

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RESPONDENT'S BRIEF ON THE MERITS

I PRELIMINARY STATEMENT

Respondent was the defendant in the trial court and the appellant in the lower tribunal. The parties will be referred to as they appear before this Court. Petitioner's brief on the merits will be referred to as "PB," followed by the appropriate page number in parentheses. The opinion of the lower tribunal is attached hereto as an appendix, and has been reported as Dominguez v. State, 508 So.2d 1316 (Fla. 1st DCA 1987). A one volume record on appeal will be referred to as "R." A three volume transcript will be referred to as "T."

II STATEMENT OF THE CASE AND FACTS

Petitioner's statement of the history of this case (PB at 1) is accurate but incomplete.

At trial, the chemist testified that Respondent's mixture of cocaine weighed 111 grams (T-89). It contained both cocaine and procaine, a non-controlled substance (T-90; T-95). The chemist had no idea what percentage of the mixture was cocaine (T-95).

At trial, Frederick Mann, an oral surgeon, testified that after he was arrested for drug trafficking, he offered to arrange some drug transactions for the police in return for favorable consideration in his own case (T-20). He arranged a sale with Thomas Taylor, whom he had known for about two years. Dr. Mann had both bought drugs from Taylor and sold drugs to him (T-28). About a month passed between his first discussion with Taylor and the actual purchase. They agreed to meet at Taylor's apartment on February 28 (T-24). The police equipped Dr. Mann with a body microphone worn under his clothing and gave him $7,100.00 with which to make the purchase. When he arrived at the house, Taylor and his wife were there and a third person. Dr. Mann identified appellant as the third person (T-26).

The third person wanted to see the money before he produced the cocaine, and they discussed the price (T-28). The third person left the house to get the cocaine; he was gone about 20 minutes, then returned (T-29). The three men were emptying four bags of cocaine into one bag to weigh it when the police

knocked at the door (T-31). When the police knocked, Taylor and the third person went to the kitchen, where Dr. Mann heard the kitchen window open. The police entered a few seconds later (T-32).

Respondent was convicted trafficking in between 28 and 200 grams of cocaine, a first degree felony, in violation of Section 893.135(1)(b)1, Florida Statutes (R-37), which is punishable by maximum of 30 years in prison, with a 3 year mandatory minimum. Respondent's crime was properly scored as a first degree felony on the category 7 sentencing guidelines scoresheet, with the corresponding assessment of 137 points (R-41). He received 2 more points for 2 prior misdemeanors, for a total of 139 points, which placed him at the low end of the cell containing 134-147 points. That cell called for a 3 1/2-4 1/2 year sentence. Respondent received a 7 year sentence (with a 3 year mandatory minimum) (R-39), double the recommended range, and a 2 or 3 cell departure, supported by 3 written reasons (R-42). The lower tribunal struck all 3 reasons and remanded for resentencing.

One of respondent's codefendants, Edna Biggs Taylor, was permitted to enter a plea to the lesser offense of possession of cocaine in exchange for a probationary sentence (R-46; 49-53; 61-69). The other codefendant, Thomas Roosevelt Taylor, entered a plea to trafficking, for a 3 year sentence, even though his sentencing guidelines scoresheet called for 3 1/2-4 1/2 years (R-46-47; 54-60; 71-83).

Respondent had been offered the same plea agreement as Mr. Taylor prior to trial (R-47-48). Respondent moved to reduce his sentence to make it more in line with that of codefendant Taylor, but the court denied the motion (R-46-85; T-176-87).

III SUMMARY OF ARGUMENT

Respondent 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 respondent'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]

The statute at issue here provides that the mere actual or constructive possession of 28 grams or more of a mixture containing cocaine is defined as trafficking in cocaine and punished as a first degree felony. Section 893.135(1)(b), 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 28 grams of cocaine, he has committed only a second degree felony, with no mandatory minimum. Sections 775.082(3)(c), 775.083(1)(b)11[2], 893.13(1)(a)1, Florida Statutes.

As in the instant case, if the amount of cocaine possessed is 28 grams or more, but less than 200 grams, the first degree felony remains the same, but mandatory minimum penalties of three years and a $50,000 fine are created. Section

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

893.135(1)(b)1, Florida Statutes. If the amount of cocaine possessed is 200 grams or more, but less than 400 grams, the first degree felony remains the same, but the mandatory minimum penalties are increased to 5 years and a $100,000 fine. Section 893.135(1)(b)2, Florida Statutes. If the amount of cocaine possessed is 400 grams or more, the first degree felony remains the same, but the mandatory minimum penalties are increased to 15 years and a $250,000 fine. Section 893.135(1)(b)3, Florida Statutes. The statute contains similar mandatory minimums for trafficking in various amounts of cannabis, heroin, phencyclidine, and methaqualone.

On the category 6 sentencing guidelines scoresheet, a defendant who possesses less than 28 grams of cocaine 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 28 and 200 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 200 and 400 grams, his point total and recommended sentence remain the same, but his mandatory minimum 5 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 400 grams of cocaine, his point total and recommended sentence remain the same, but his 15 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 28 grams of cocaine 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 28 grams of cocaine is already being punished for the amount of cocaine 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, 488 So.2d 523 (Fla. 1986).

Respondent submits that both types of Mischler 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.

Santiago v. State, 478 So.2d 47 (Fla. 1985) has already answered the 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 about in footnote 2, possession of cocaine 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.

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.

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 cocaine, and the least quantity, 28 grams, and anything more supports a departure, than it is to say that the guidelines, being adequate for the greatest amount, 400 grams, and most culpable activity, actual sale, support underdeparture for anything less. If the legislature intended to treat mere possession of cocaine and actual trafficking in cocaine as equally bad acts, and if the legislature chooses not to distinguish among quantities more narrowly than the 28-200 grams, 200-400 grams, or over 400 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 28 grams and 111 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.

There is nothing to prevent the legislature or this Court from drawing finer distinctions amount quantities of cocaine. They could, for example, include extra points on the scoresheet based on quantity -- such as no extra points for the 28-200

gram range, x additional points for 200-400 grams, xx additional points for more than 400 grams. The legislature, the Sentencing Guidelines Commission, nor this Court has done this; trial or appellate judges may not do it for them.

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 cocaine? Is it a one cell increase for 100 grams, or a two cell increase for 200 grams, or a three cell increase for 300 grams?

Other appellate courts have struggled over this question. Guerrero v. State, 484 So.2d 59 (Fla. 2nd 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. 2nd DCA 1986) (1,952 grams of cocaine permissible ground for departure); Irwin v. State, 479 So.2d 153 (Fla. 2nd DCA 1985) (quantity unstated but permissible ground for departure, citing Smith v. State, 454 So.2d 90 (Fla. 2nd DCA 1984); Benitez v. State, 470 So.2d 734 (Fla. 2nd DCA 1985) (quantity not stated but permissible ground for departure); Jean v. State, 455 So.2d 1083 (Fla. 2nd 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" or LSD, questionable validity in light

of Santiago). Compare these cases with Jiminez v. State, 486 So.2d 36 (Fla. 2nd 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. 2nd 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 decision of Newton v. State, 490 So.2d 179 (Fla. 1st DCA 1986). In that case the defendant 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.

In Flournoy v. State, 507 So.2d 668 (Fla. 1st DCA 1987), pending, case #70,713, a rare en banc opinion, the lower tribunal followed the Newton logic but not its holding and

found that a defendant who had been convicted of attempted trafficking in 12.5 grams of heroin could receive a departure sentence because it was so close to the 14 grams necessary for the next higher minimum mandatory.

On the other hand, other appellate courts have recently held that the quantity of drugs can never operate as a reason for departure. See, e.g., Banks v. State, 509 So.2d 1320 (Fla. 5th DCA 1987). This approach is far superior to the hair-splitting done by the First District in Newton and Flournoy, particularly where the total quantity, as here, may contain a majority of a substance which is not even a controlled substance.

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.

Petitioner attacks this Court's Mischler decision (PB at 5-7) without demonstrating how it should have been decided differently or why it should be promptly overruled. Petitioner next argues that "first degree felonies have been reduced to third degree falonies" [sic] (PB at 8; 12). Respondent fails to see how this is so, since, as demonstrated by the above discussions at page 7 of this brief, trafficking is far more serious than mere possession.[3]

Petitioner next makes a veiled suggestion that the guidelines are unconstitutional, and suggests that they be abolished! (PB at 8-11). This is a curious position, since it was the Attorney General's office which lobbied for their enactment, and which is responsible for upholding the validity of any state statute. If the guidelines are unconstitutional, then let us get rid of them.

This case demonstrates how unfair the guidelines are in practice, even though their stated purpose was to make sentencing more uniform. Mr. Taylor, whose residence was used for the transaction, had dealt drugs with Dr. Mann previously (T-28). There is nothing in the record to show that respondent had any other dealings in drugs; in fact, he was unknown to the police before this transaction (T-68).

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[3] Petitioner erroneously states that trafficking is punishable by life (PB at 9). It is not.

Codefendant Taylor and respondent had the same recommended range, i.e., 3 1/2 - 4 1/2 years. Yet Taylor received an under-departure sentence of only 3 years, and respondent received an upward-departure sentence of 7 years.[4] If any departure was warranted for respondent, it should have been a downward departure to equalize his sentence with that of the equally-culpable Mr. Taylor. See the discussion in Sanders v. State, 510 So.2d 296 (Fla. 1987). There is no way to justify respondent's upward-departure sentence, and petitioner has not done so. This Court must answer the question in the negative and approve the First District's result but not its logic.

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[4] The prosecutor justified the disparity by saying the offer was made on a "first-come, first-served basis" and that he wanted one of the participants to testify against the other (T-183). Yet Taylor never testified!

V CONCLUSION

Based upon the foregoing, respondent requests that the certified question be answered in the negative, or answered in the affirmative, but only for a large quantity of drugs, far in excess of the highest statutory range. In either event, the decision of the First District, which reversed respondent's departure sentence, must be approved.

Respectfully submitted,

MICHAEL E. ALLEN
PUBLIC DEFENDER

P. DOUGLAS BRINKMEYER #197890
Assistant Public Defender
Second Judicial Circuit
Post Office Box 671
Tallahassee, Florida 32302
(904) 488-2458

ATTORNEY FOR RESPONDENT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by hand-delivery to Mark Menser, Assistant Attorney General, The Capitol, Tallahassee, Florida, and by U.S. mail to Mr. Juan Dominguez, #099253, Post Office Box 667, Bushnell, Florida 33513, on this 8th day of October, 1987.

P. Douglas Brinkmeyer

P. DOUGLAS BRINKMEYER