IN THE SUPREME COURT OF FLORIDA

DAVID CAUTHEN,

Petitioner,

v.

CASE NO. 71,472

STATE OF FLORIDA,

Respondent.

_____/

BRIEF OF PETITIONER ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner was the defendant in the trial court, the appellant in the lower tribunal, and 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 one volume transcript will be referred to as "T". Attached hereto as an appendix is the opinion of the lower tribunal.

STATEMENT OF THE CASE AND FACTS

By information filed November 7, 1986, petitioner was charged with possession of more that 20 grams of cannabis and conspiracy to traffick in more than 100 but less than 2,000 pounds of cannabis (R 4). On December 30, 1986, petitioner entered a plea to the possession charge, and the conspiracy was dropped (R 11; 19).

Petitioner appeared for sentencing on February. 3, 1987. A sentencing guidelines scoresheet called for any non-state prison sanction (R 17; T 5-6). Petitioner's counsel objected to the court considering the quantity of marijuana without proof of its weight (T 19). The prosecutor stated that the sworn complaint alleged that there were 50 pounds. Petitioner stated that he did not know how much there was. Petitioner's counsel again noted that there was no evidence as to the weight (T 21-22).

The court imposed a split sentence of 18 months in prison, with credit for time served of 118 days, followed by 18 months probation, condition (10) of which requires that petitioner must reside in the Bridges Drug Rehabilitation Program in Orlando (R 13-16;22; T 23). As justification for the departure from the guidelines, the court found that petitioner possessed a bale of cannabis, on authority of Mitchell v. State, 458 So.2d 10 (Fla. 1st DCA 1984) (R 20-21).

On February 18, 1987, a timely pro se notice of appeal was filed (R 23). On April 15, 1987, the Public Defender of the Second Judicial Circuit was designated to represent petitioner.

On appeal, petitioner argued that the drug program condition of probation was excessive, with which the lower tribunal agreed. Petitioner also argued that the quantity of the marijuana had not been proven, and that the quantity was not a proper reason for departure even if proven. The lower tribunal ignored the former and disagreed with the latter, but certified the question (Appendix).

On November 6, 1987, a timely notice of discretionary review was filed.

SUMMARY OF ARGUMENT

Petitioner will again attack his sentence in this brief. First, he will argue that the quantity of marijuana he possessed was not proven beyond a reasonable doubt, which is the recognized legal standard. Second, petitioner will argue that, even if this Court finds the quantity was proven, it cannot serve as a reason for departure.

This Court must answer the certified question in the negative, vacate petitioner's split sentence and remand for resentencing.

ARGUMENT

PETITIONER'S SPLIT SENTENCE, WHICH WAS A DEPARTURE FROM THE RECOMMENDED RANGE OF NON-STATE PRISON, IS ILLEGAL, BECAUSE THE QUANTITY OF DRUGS WAS NOT PROVEN AND BECAUSE THE QUANTITY CANNOT SERVE AS A REASON FOR DEPARTURE

Petitioner's recommended guidelines sentence was non-state prison (R 17). He received 18 months in state prison, followed by 18 months on probation. The lower tribunal found that the possession of 50 pounds of marijuana was an adequate reason for departure, and so must have implicitly rejected the argument that the quantity was not proven.

This Court has held that facts underlying reasons for departure must be credible and proven beyond a reasonable doubt. State v. Mischler, 488 So.2d 523, 525 (Fla. 1986). This Court has recently declined to recede from this heavy evidentiary standard. Florida Rules of Criminal Procedure re Sentencing Guidelines, 12 FLW 162, 163 (Fla. Apr. 2, 1987):

> We reject this proposal. ...If a fact is contested, some form of proof establishing that fact beyond a reasonable doubt is necessary. We adhere to our ruling in Mischler that the facts to support a departure should be proved beyond a reasonable doubt, and we reject this requested change.[1]

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[1]The 1987 Legislature amended the statute to lessen the standard of proof to a "preponderance of the evidence. Ch. 87-110, Laws of Florida. That statute is not applicable to petitioner, whose crime occurred prior to its effective date. Booker v. State, case no. 68,400 (Fla. September 24, 1987) (1986 amendment limiting scope of appellate review cannot be applied retroactively).

In the instant case, petitioner repeatedly stated that the prosecutor had not proven the quantity of marijuana by any evidentiary standard, including beyond a reasonable doubt. This Court must follow Mischler and hold that the reason for departure is invalid, because it was never proven.

Even if the amount was proven, the lower court erred in departing on authority of the early guidelines case of Mitchell because it is no longer good law and has been impliedly overruled by Mischler and Santiago v. State, 478 So. 2d 47 (Fla. 1985).

Mischler held that an element of the offense cannot be used again as a reason for departure, because that element is inherent in the degree of the crime and the corresponding guidelines range. Here, petitioner was convicted of felony possession of marijuana, in violation of Section 893.13(1)(a)2, Florida Statutes. Cannabis is a Schedule I drug. Section 893.03(1)(c)3, Florida Statutes. After Mitchell, this Court held in Santiago v. State, supra, 478 So.2d at 49, regarding LSD, that:

> 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.

The dissenting opinion of Judge Thompson in Mitchell makes more sense than the majority, especially in light of the subsequent pronouncements of this Court:

> While I agree with the majority that possession of a bale 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.

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 marijuana, and the least quantity, 20 grams, and anything more supports a departure, than it is to say that the guidelines, being adequate for the greatest amount, 10,000 pounds, and most culpable activity, actual sale, support underdeparture for anything less. If the legislature intended to treat mere possession of marijuana and actual trafficking in marijuana as equally bad acts, and if the legislature chooses not to distinguish among quantities more narrowly than the 20 grams-100 pounds, 100-2,000 pounds, 2,000-10,000 pounds, or over 10,000 pounds ranges, the judiciary may not draw distinctions which the legislature has not chosen to. There are, arguably, logical distinctions between possession of 20 grams and 50 pounds, 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 marijuana. They could, for example, include extra points on the scoresheet based on quantity. 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 marijuana? Is it a one cell increase for 100 pounds, or a two cell increase for 200 pounds, or a three cell increase for 300 pounds?

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).

The lower tribunal seems to have ignored its prior 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. The lower tribunal also ignored its previous decision in Dominguez v. State, 508 So.2d 1316 (Fla. 1st DCA 1987), review pending, case no. 70,883, in which it found

trafficking in 114 grams of cocaine to be an impermissible reason for departure because it "falls dead center in the statutory category". Id. at 1318. Petitioner's 50 pounds, even if proven, is more than the 28 grams (or 1/16 pound) necessary for possession, but far less than the 100 pounds necessary for trafficking, and about in "dead center" of the possession category..

In Flournoy v. State, 507 So.2d 668 (Fla. 1st DCA 1987), pending, case no. 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.

Since the lower tribunal has demonstrated that it cannot be consistent in its decisions on the quantity of drugs, then the stated purpose of the guidelines, to promote uniformity, is ignored, and the outcome of a particular appeal is totally unpredictable.

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, was never proven.

Any other construction would be illogical and contrary to the letter and spirit of the guidelines. Unless and until the legislature amends the drug 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.

In any event, this Court will resolve this dispute when it decides Atwaters v. State, 495 So.2d 1219 (Fla. 1st DCA 1986), review pending, case no. 69,555, oral argument held July 1, 1987.[2]

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[2]This Court will recall that the undersigned's fall-back position at the oral argument was that quantity is relevant only if it far exceeds the "outer limits" of the statute. That position does not harm petitioner, because 50 pounds is far less than the quantity required for the most serious marijuana offense, trafficking in over 10,000 pounds. §893.135(1)(a)3, Fla. Stat.

CONCLUSION

Based upon the foregoing argument, reasoning, and citation of authority, petitioner requests that his departure sentence be reversed, and that he be given any non-state prison sanction.

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 Elizabeth Masters, Assistant Attorney General, The Capitol, Tallahassee, Florida, and by U.S. mail to Mr. David Cauthen, #803639, Post Office Box 99, Clermont, Florida 32711, on this 23 day of November, 1987.

P. Douglas Brinkmeyer

P. DOUGLAS BRINKMEYER