OIA 5-26-88

IN THE SUPREME COURT OF FLORIDA

EDWARD PAUL PETERS

Petitioner,

vs.

STATE OF FLORIDA

Respondent.

Case No. 71,609

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

BRIEF OF PETITIONER ON MERITS

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TENTH JUDICIAL CIRCUIT

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STATEMENT OF THE CASE AND FACTS

On November 17, 1983, Appellant, Edward Paul Peters, was charged by information in Polk County Circuit Court with having sold and possessed a misdemeanor amount of cannabis on October 20, 1983, contrary to section 893.13 Florida Statutes (1981). (R11-12) By the same information, he was charged with having possessed drug paraphernalia and a felony amount of cannabis on October 28, 1983, contrary to sections 893.13, 893.147 Florida Statutes (1981) (R12-13)

On January 30, 1984, Peters pled guily to selling cannabis and possessing a felony amount of cannabis; the drug paraphernalia charge and the misdemeanor cannabis possession charges were nolle prossed. (R15) On March 22, 1984, adjudication was withheld and Peters was placed on probation for three years. (R20, 22)

On August 13, 1985, Peters was charged by information in Polk County Circuit Court with having possessed a felony amount of cannabis on July 24, 1985, contrary to section 893.13 Florida Statutes (1983). (R25) On August 22, 1985, Peters was charged by affidavit with having violated his probation, by failing to pay the costs of supervision and by selling cannabis. (R27)

On October 11, 1985, probation was revoked. After a guilty plea Peters was adjudged guilty of both the 1983 and the 1985 offenses, and placed on community control for two years. (R34-35,38)

On November 26, 1985, Peters was charged with having sold and possessed with intent to sell cannabis on October 16, 1985, contrary to section 893.13 Florida Statutes (1983). (R40)

On February 6, 1986, Peters was charged by affidavit with having violated his community control by selling and possessing cannabis and by not remaining at his approved residence. (R44)

At a hearing on July 3, 1986, Peters pleaded no contest to the charges and admitted violating his community control. (R54-55) The recommended guideline sentence was 12 to 30 months. (R81) Over defense objection that the optional one-cell departure for violation of probation did not apply in this case, the trial court sentenced Peters to three years in prison, concurrent on all charges. (R58,71-75,78-80) Peters was adjudged guilty of the new charges. (R65-66)

Peters appealed to the Second District Court of Appeal. In an opinion dated December 2, 1987, the court held that the one-cell increase for violation of probation was legal in this case. Peters v. State, 516 So.2d 60 (Fla. 2d DCA 1987). Peters then appealed to the Supreme Court of Florida. This court accepted jurisdiction in an order dated February 23, 1988.

SUMMARY OF THE ARGUMENT

I. Florida Rule of Criminal Procedure 3.701(d)(14) does not clearly state whether a one cell increase in the sentence for violation of probation should be applied to all offenses pending for sentencing or just to the offenses for which the defendant was placed on probation. This supreme court should adopt the holdings of the fourth and fifth districts that under the logic of the rule, this aggravating factor (probation violation) should be used only for those offenses for which it is relevant. In addition, this court should determine that, pursuant to its decision in Hendrix, the same probation should not be used both as points for legal status and as a reason to depart.

II. Rule 3.701(d)(14) should not have been used to aggravate the sentence for Petitioner's 1984 offenses, because the rule was not in effect at that time. This error was not harmless, because, contrary to the views of the second district, a violation of community control--by itself--is not and never has been a valid reason for departure from the guidelines. The cursory notation on the bottom of the scoresheet did not satisfy the requirement for a thoughtful and careful exposition of written reasons for departure.

III. Petitioner's conviction and sentences for both sale of narcotics and possession with intent to sell violated double jeopardy. Since the two offenses are listed in the same subsection of the same statute, the legislature probably did not intend multiple punishments but rather provided for alternate methods of proof of the same offense. Petitioner did not procedurally default on this issue because a violation of double

jeopardy is fundamental error which can be raised at any time, even after a guilty plea.

ARGUMENT

ISSUE I

THE TRIAL COURT IMPROPERLY DEPARTED FROM THE GUIDELINES BY ONE CELL ON OFFENSES FOR WHICH PETITIONER HAD NEVER BEEN PLACED ON PROBATION.

A.

Florida Rule of Criminal Procedure 3.701(d)(14) currently reads as follows:

> Sentences imposed after revocation of probation or community control must be in accordance with the guidelines. The sentence imposed after revocation of probation may be included within the original cell (guidelines range) or may be increased to the next higher cell (guidelines range) without requiring a reason for departure.

This ambiguous rule does not clearly say whether a one cell increase is permitted for all offenses for which the defendant is being sentenced or only for those offenses for which the defendant was placed on probation. The fourth and fifth districts agree with the second district's interpretation in Meadows v. State, 498 So.2d 1018 (Fla. 2d DCA 1986) that the one cell increase applies only to the offenses whose probation is being revoked and not to the new substantive probation violations. Green v. State, 513 So.2d 795 (Fla. 4th DCA 1987); Cummins v. State, 12 F.L.W. 328 (Fla. 5th DCA Feb. 4, 1988)

Green, Cummins, and Meadows give effect to the logic and policy underlying Rule 3.701(d)(14). This rule suggests that offenses should be punished more harshly if the defendant is given the opportunity of probation and yet fails to abide by the conditions of the opportunity. The rule allows judges to increase

sentences beyond the recommended guideline range, because the defendant was given a second chance on these offenses and yet failed to take advantage of it. This policy underlying Rule 3.701(d)(14), therefore, does not apply to the new substantive offenses because a defendant is not given a second chance on these offenses. He gets only one chance; he is sentenced immediately. In consequence, the rule's policy to punish more harshly those given two chances does not apply to the new offenses. To be sure, the new offenses are committed while the defendant is on probation; as Meadows points out, however, this factor is "properly entered into the guideline scoresheet as an assessment for legal constraint." Meadows, 498 So.2d at 1019. In summary, then, Meadows, Green, and Cummins teach that it is illogical to use a probation violation as an aggravating factor in a sentence which is unrelated to the underlying probation.

B.

The second district, in Frick v. State, 510 So.2d 1077 (Fla. 2d DCA 1987), receded from Meadows and decided instead to follow its previous decision in Lee v. State, 491 So.2d 1289 (Fla. 2d DCA 1986). Lee does not really even discuss the Meadows issue; it instead addresses the question whether the same probation can be used both as points on the scoresheet for legal status and as a reason to depart from the guidelines by one cell. Lee holds that the same probation can be used for both purposes for all offenses pending for sentencing. This holding is contrary to Watkins v. State, 498 So.2d 576,578 (Fla. 3d DCA 1986), which criticizes using a defendant's legal status twice in this way.

This disagreement between Lee and Watkins in effect

revolves around another ambiguity in Rule 3.701(d)(14). The rule can be read either as authorizing a limited departure sentence without written reasons, or as enlarging the scoresheet's recommended sentencing range. If, on the one hand, the rule is read as enlarging the scoresheet's recommendation, then using the same probation both for legal status points and for increasing the guidelines range would not be the illegal double dipping condemned by Hendrix v. State, 475 So.2d 1218 (Fla.1985). It would instead be only a means of giving added emphasis to a particular part of the scoresheet, just as the prior category multipliers give added emphasis to parts of a defendant's prior record. See, Fla.R.Crim.P. 3.701(d)(15). If, on the other hand, the rule is read as authorizing a limited departure sentence, then it would be the illegal double dipping condemned by Hendrix. "We find a lack of logic in considering a factor to be an aggravation allowing departure from the guideline when the same factor is included in the guidelines." Hendrix, 475 So.2d at 1220 (quoting Burch v. State, 462 So.2d 548,549 (Fla. 1st DCA 1985)).

Petitioner contends that for two reasons, a sentence pursuant to Rule 3.701(d)(14) should be viewed as a departure sentence rather than a guidelines sentence. First, although some cases refer to the one cell increase as an increase of the guidelines range, most cases characterize it as a departure sentence which does not require written reasons. Henderson v. State, 496 So.2d 965 (Fla. 1st DCA 1986); Alexander v. State, 513 So.2d 1117 (Fla. 2d DCA 1987); Saldana v. State, 510 So.2d 1238 (Fla. 3d DCA 1987); Deegan v. State, 503 So.2d 970 (Fla. 4th DCA 1987); Boldes v. State, 475 So.2d 1357 (Fla. 5th DCA 1985). To be sure, in none

of these cases is this characterization more than dictum. That most of the cases do use this characterization, however, is suggestive of the correct view. Second, since Rule 3.701(d)(14) is in fact thoroughly ambiguous on this point, the common law rule of lenity controls. It teaches that "courts must resolve all doubts in favor of the accused." Carawan v. State, 515 So.2d 161, 165 (Fla.1987).

Thus, since the rule of lenity requires that a Rule 3.701(d)(14) sentence be viewed as a departure from the guidelines, the rule cannot be used when points have already been scored for legal status. Lee, Frick, and the present case are therefore wrong on this point.

ISSUE II

THE TRIAL COURT VIOLATED THE EX POST FACTO DOCTRINE BY APPLYING A SENTENCING GUIDELINES AMENDMENT TO OFFENSES WHICH OCCURRED BEFORE THE EFFECTIVE DATE OF THE AMENDMENT; THE COURT SHOULD THEREFORE HAVE LISTED WRITTEN REASONS FOR THE DEPARTURE.

The offenses in case no. 83-3548 were committed on October 20 and 28, 1983, (R11-13) prior to the effective date of Florida Rule of Criminal Procedure 3.701(d)(14). See, The Florida Bar; Amendment to Rules of Criminal Procedure, 451 So.2d 824 (Fla.1984). The second district rejected the contention that using this rule in case no. 83-3548 to increase the sentencing range by one cell violated the ex post facto doctrine. The court reasoned that this error was harmless because at the time these offenses were committed, the court could have departed solely on the basis that Peters had violated his community control. Rule 3.701(d)(14), therefore limited the extent of departure to one cell for violation of community control. Since this change was favorable to the defendant, applying the new amendment retroactively did not implicate the ex post facto doctrine.

Petitioner disagrees with virtually every aspect of this reasoning. Petitioner first disagrees that, at the time of the offense, a departure sentence could be justified solely by the mere fact of a violation of community control. Although some district courts did have this rule, Carter v. State, 452 So.2d 953 (Fla. 5th DCA 1984), others did not. O'Malley v. State, 462 So.2d 869 (Fla. 4th DCA 1985). This supreme court never had an opportunity to rule on the question. If this court had ruled

on the question, Petitioner contends that it would have ruled consistently with its opinion in Pentaude v. State, 500 So.2d 526 (Fla.1987). Pentaude holds that a violation of probation, by itself, is not enough to justify a departure sentence. It is not now and never was true, for example, that a failure to pay $30 costs of supervision or a failure to provide written monthly reports to the probation officer is a clear and convincing reason for departure.

Consequently, the present opinion is wrong to say that Rule 3.701(d)(14) was an amendment favorable to the defendant. Contrary to the views of the second district in the present case, the rule did not function to limit departures but rather to authorize them. That Rule 3.701(d)(14) was an unfavorable amendment for the defendant which could not be applied retroactively was confirmed at the time by numerous district court decisions. Elbert v. State, 473 So.2d 30 (Fla. 1st DCA 1985); Burke v. State, 460 So.2d 1022 (Fla. 2d DCA 1984); Arnett v. State, 471 So.2d 547 (Fla. 4th DCA 1985).

Petitioner also disagrees with the implication of the present decision that the absence of written reasons for departure can sometimes be harmless. The opinion seems to suggest that a trial court's improper use of Rule 3.701(d)(14) to avoid the necessity of written departure reasons can sometimes be harmless. A failure to provide written departure reasons, however, is per se reversible error. State v. Jackson,478 So.2d 1054 (Fla.1985). Consequently, the second district is wrong to suggest that it is not.

To be sure, the bottom of the scoresheet in this case

does list as a reason for departure "violation of community control." (R81) In accordance with its decision in Speights v. State, 495 So.2d 882 (Fla. 2d DCA 1986) and the first district's decision in Knight v. State, 501 So.2d 150 (Fla. 1st DCA 1987), the second district may have determined that this scoresheet notation was sufficient to satisfy the requirement of written reasons for departure. The third and fifth districts, however, disagree that scoresheet notations satisfy the requirement. Mortimer v. State, 490 So.2d 93 (Fla. 3d DCA 1986); Watson v. State, 492 So.2d 831 (Fla. 5th DCA 1986).

The present case illustrates why the third and fifth districts are right on this issue. The record does not show that the trial judge actually wrote the notation on the scoresheet. This cursory notation does not explain the judge's position on what is now the crucial question, i.e., whether, under Pentaude, the violation was sufficiently egregious to justify a departure sentence. The notation does not comport with the spirit of the rule as explained in Jackson.

> For the first time in this state, a body of law is being developed regarding considerations which may or may not be appropriate in sentencing criminal defendants. This effort would best be served by requiring the thoughtful effort which "a written statement providing clear and convincing reasons" would produce. This in turn, should provide a more precise, thoughtful, and meaningful review which ultimately will result in the development of better law.

Jackson, 478 So.2d at 1056.

Thus, a valid written reason for departure was necessary in this case. The scoresheet notation did not satisfy this re-

quirement. The second district was wrong to hold otherwise.

ISSUE III

CONVICTION FOR BOTH SALE OF A CONTROLLED SUBSTANCE AND POSSESSION WITH INTENT TO SELL VIOLATED THE DOUBLE JEOPARDY DOCTRINE.

Petitioner was charged with both sale of a controlled substance and possession with intent to sell the substance during the same act.[1] (R40-42)

The first district has ruled that charging a defendant with both of these offenses violates the double jeopardy doctrine. Fletcher v. State, 428 So.2d 667 (Fla. 1st DCA 1982). The second district disagrees. Dukes v. State, 464 So.2d 582 (Fla. 2d DCA 1985). This supreme court's decision in Carawan v. State, 515 So.2d 161 (Fla.1987), however, puts a completely different complexion on this issue. Under Carawan, the question is whether "an examination of relevant factors provides a reasonable basis for concluding that the legislature did not intend to impose multiple punishments." Id. at 169.

Petitioner contends that several relevant factors provide a reasonable basis for this conclusion in this case.

First, sale and possession with intent to sell are both part of the same statutory provision, §893.13(1)(a) Fla.Stat. (1985). ("[I]t is unlawful for any person to sell, manufacture, or deliver, or possess with intent to sell, manufacture, or deliver a controlled substance.") This fact suggests that the legislature intended this statute to encompass only one offense.

1/ Although it is obvious from the information that these offenses occurred during the same act, the present record does not explicitly say that they did. Consequently, Petitioner has requested this court to allow him to supplement the record with a complaint affidavit which shows the facts of the case.

Thus, Rotenberry v. State, 468 So.2d 971 (Fla.1985) plainly assumes that the various parts of section 893.13(1)(a) all represent the same offense. In the course of discussing, whether simple sale is a lesser included offense of trafficking, Rottenberry assumes that simple sale is the equivalent of violating section 893.13(1)(a) in its entirety and that the (single) offense of violating section 893.13(1)(a) requires proof that the offender (1) sold, manufactured, delivered, or possessed with intent to sell, manufacture or deliver (2) a controlled substance." Id. at 976. Rotenberry therefore implies that sale, delivery, manufacture, and possession with intent should be considered as one violation of the entire statute and not as different violations of just parts of it.

Similarly, Bell v. State, 437 So.2d 1057 (Fla.1983) notes that simple possession and simple sale are codified in different statutes. Id. at 1060. Bell reasons, however, that because the legislature included "sale and possession of drugs within the [same] trafficking statute, it is apparent that the legislature intended to facilitate trafficking prosecutions through the use of alternative methods of proof rather than attempting to provide for multiple convictions and punishments for criminal conduct which is basically unitary." Id. Although Bell, Rotenberry, and Carawan reach conflicting results, this general principle that narcotics offenses are the same if they are defined in the same statute, can be gleaned from all three cases since the instant offenses are both defined by the same statute, they should therefore be considered the same for double jeopardy purposes.

A second factor relevant to determining legislative intent is whether the different statutory language addresses the

same evil. Here, the various parts of section 893.13(1)(a) do address the same evil, i.e., making controlled substances available for others.

Third, according to Florida Rule of Criminal Procedure 3.140(k)(5),

> [f]or an offense which may be committed by doing of one or more of several acts, or by one or more of several means, or with one or more of several intents or results, it is permissible to allege in the disjunctive or alternative such two or more acts, means, intents, or results.

Rule 3.140(k)(5) suggests here that, sometimes the legislature intends to allow a single offense to be proved in several different ways. Section 893.13(1)(a) is an example of this legislative intent. Carey v. State,349 So.2d 820 (Fla. 3d DCA 1977); Weinstein v. State, 348 So.2d 1194 (Fla. 3d DCA 1977). Consequently, the legislature intended section 893.13(1)(a) to encompass only one offense and not two or more.

A fourth relevant factor is the lack of violence involved in the instant offenses. Carawan finds an anomaly in supposing that a single act resulting in death could be only one offense but a single non-violent act (such as selling a controlled substance) could be two offenses. Carawan, 515 So.2d at 170.

A fifth relevant factor is the "inherent relationship" between the two charged offenses in the sense that, almost invariably, proof of possession with intent to sell is necessarily included as part of the proof of actual sale. See, United States v. Johnson, 637 F.2d 1224 (9th Cir. 1980) (uses inherent relationship test and rejects mechanical comparison of elements). The

only time a defendant might be guilty of sale and not of possession with intent to sell is when the prosecution's theory is conspiracy or aiding and abetting. Even in this instance, however, the two offenses are inherently related, because the actual seller must have the substance in his possession. This inherent relationship is a fifth relevant indication that the legislature did not intend to punish these offenses separately.

Because the relevant facts provide "a reasonable basis for concluding that the legislature did not intend to impose multiple punishments," Carawan, 515 So.2d at 169, convicting Petitioner for both sale and possession with intent to sell violated double jeopardy. This court should therefore vacate the conviction for possession with intent to sell.

Finally, Petitioner concedes that this issue was not raised at either the trial or district court level. Petitioner contends nevertheless that, for three reasons, no procedural default on this issue occurred.

First, according to State v. Johnson, 483 So.2d 420 (Fla.1986), a double jeopardy claim is fundamental error which can be raised at any time, even after a plea bargain. The circumstances of the plea in this case do not indicate an express and knowing waiver of the sort that occurred in United States v. Pratt, 657 F.2d 218 (8th Cir. 1981).

Second, under State v. Whitfield, 487 So.2d 1045 (Fla. 1986) an illegal sentence can be appealed despite the lack of objection below. In this case, if Petitioner's double jeopardy argument is valid, then he received a illegal sentence. Third, Carawan, which overruled Rotenberry, radically changed the law

in Florida regarding double jeopardy and narcotics violations. Carawan was decided after the guilty plea in this case and after all briefs were filed on appeal to the second district. Consequently, Petitioner had sufficient cause for failing to raise this claim at an earlier date. See, Reed v. Ross, 468 U.S. 1, 16-17 (1984) ("Accordingly we hold that where a constitutional claim is so novel that its legal basis is not reasonably available to counsel, a defendant has cause for his failure to raise the claim in accordance with applicable state procedures." Overruling of prior precedent "by definition" gives rise to such a situation).

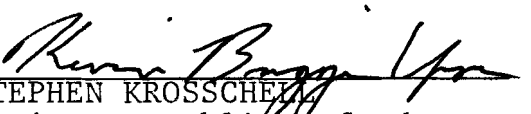
For these three reasons, the lack of a contemporaneous objection should not preclude this supreme court's review of this issue.

CONCLUSION

Petitioner requests this court to reverse the decision of the second district in this case.

Respectfully submitted,

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

BY: 
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