IN THE SUPREME COURT OF FLORIDA

CARL EUGENE WELCH

Petitioner,

vs.

STATE OF FLORIDA

Respondent.

Case No. 71,966

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 September 10, 1982, Petitioner, Carl Eugene Welch, was charged by information in Lee County Circuit Court with having committed grand theft on August 8, 1982, contrary to section 812.014 Florida Statutes (1981). (R1) On March 28, 1983, after a guilty plea, Welch was given five years probation with a condition of a year in the county jail. (R6) On June 10, 1983, the remainder of Welch's incarceration was suspended, but the term of probation was continued unchanged. (R8)

After getting out of jail, Welch reported only once to his probation officer and then had no further contact with the probation authorities. (R21) On January 5, 1984, Welch was charged by affidavit with having violated his probation by not making monthly reports, by not paying costs of supervision, and by changing his residence without permission. (R9) In June, 1986, Welch turned himself in. (R21) The sentencing guidelines recommendation, after a one cell increase for violation of probation, was 12-30 months incarceration or community control. (R29) On October 15, 1986, after a guilty plea, probation was revoked and Welch was sentenced to 30 months in prison, to be followed by two years community control. (R15,40,48) Welch was also ordered to pay a fine of $100,00. (R40)

On appeal, the Second District Court of Appeal ruled, in an opinion dated February 3, 1988, that Welch's sentence was legal. The court did, however, certify conflict with Johnson v. State, 511 So.2d 748 (Fla. 5th DCA 1987).

Welch mailed a notice to invoke discretionary jurisdiction on February 17, 1988. The Florida Supreme Court issued a briefing schedule on February 23, 1988.

SUMMARY OF THE ARGUMENT

I. The second district's rule that a maximum guideline sentence can be followed by community control without written reasons for departure is wrong for several reasons. First, the word "or" in the phrase "12-30 months incarceration or community control" normally refers to mutually exclusive alternatives. Second, that community control cannot be combined with incarceration under the second cell of the guidelines is not absurd because they cannot be combined under the first cell either. Third, nothing in the guidelines allows for split sentences which include both community control and incarceration. Fourth, community control is not interchangeable with probation. Fifth, community control and probation are different because the maximum term of community control is only two years. Sixth, the guidelines specifically suggest that community control is an alternative not an addition to incarceration. Seventh, all doubts should be resolved in favor of the accused.

II. The trial court improperly failed to consider the mandatory statutory criteria for imposing fines.

ARGUMENT

ISSUE I

WHETHER THE IMPOSITION OF COMMUNITY CONTROL, WHEN IT FOLLOWS A MAXIMUM GUIDELINE SENTENCE OF INCARCERATION, IS A DEPARTURE FROM THE GUIDELINES.

The recommended guideline sentence in this case was any nonstate prison sanction. (R29) Since Welch had violated his probation, he could be sentenced to the next higher cell--12-30 months incarceration or community control--without written reasons for departure. The trial judge stated at the sentencing hearing that he could not see any reasons for departure. (R36) Consequently, he imposed a sentence of 30 months in prison, to be followed by two years community control. (R36) The question presented on appeal is whether this split sentence is a departure from the guidelines.

Section 948.01(8) Florida Statutes (1985) authorizes a split sentence of incarceration and community control. The Committee Note to Florida Rule of Criminal Procedure 3.701(d)(12) states that a split sentence of incarceration followed by probation is not a departure sentence if the total sentence is less than the term provided by general law. This committee note, however, does not discuss split sentences which include community control and incarceration.

In the light of section 948.01(8) and rule 3.701(d)(12), the second cell recommendation of 12-30 months or community control is ambiguous and subject to three interpretations. Interpretation (1), adopted by the second district in Francis v. State, 487 So.2d 348 (Fla. 2d DCA 1986), is that community control is

more like probation than like incarceration. Consequently, community control can be added to a maximum guideline prison sentence without requiring written reasons for departure. The second district expanded on this reasoning in the present case. The court stated

> . . . that the only limitation on the term of any sentence imposed by the trial court under this category refers to the twelve to thirty months' incarceration. A sentence of community control is not limited by a period of time and could be imposed for a period not to exceed the term provided by general law. It must therefore follow that a split sentence of incarceration which is within the thirty-month limitation followed by a period of community control is not a departure sentence as contemplated under this category of the guidelines.

Welch v. State, 13 F.L.W. 382,383 (Fla. 2d DCA Feb. 3, 1988).

Interpretation (2), adopted by the fifth district in Johnson v. State, 511 So.2d 748 (Fla. 5th DCA 1987) is that community control and incarceration are mutually exclusive alternatives for the second cell of the guidelines. A trial court can impose either community control or incarceration but not both.

Interpretation (3), adopted by the first district in Sanders v. State, 516 So.2d 38 (Fla. 1st DCA 1987), is that a split sentence of community control and incarceration can be imposed within the second cell of the guidelines, but the combined term cannot exceed thirty months. This interpretation says in effect that community control is more like incarceration than like probation. Consequently, community control can be substituted for a part of the incarcerative portion of the guidelines recommendation but cannot be substituted for the probation part.

Petitioner contends that, for seven reasons, this supreme court should reject the second district's view and accept the view

of the fifth district as announced in Johnson. Some (but not all) of these reasons also apply against the first district's interpretation. Petitioner prefers the fifth district's analysis but would accept the first district's analysis, since both analyses would have the same result in his case.

First, the second cell does not recommend incarceration and community control but rather incarceration or community control. The standard rule of construction is that "the word 'or' is generally construed in the disjunctive when used in a statute or rule." Sparkman v. McClure, 498 So.2d 892,895 (Fla.1986). See, Pompano Horse Club, Inc. v. State ex.rel. Bryan, 93 Fla. 415, 425, 111 So.801, 805 (1927) ("In its elementary sense the word 'or' is a disjunctive particle that marks an alternative, generally corresponding to 'either,' as 'either this or that' . . .It often connects a series of words or propositions, presenting a choice of either.") Consequently, according to this standard rule of construction, since the two alternatives of incarceration and community control are presented disjunctively, they should be considered to be mutually exclusive.

Second, Francis rests primarily on the absurdity it sees in supposing that the second cell of the guidelines is the only cell under which community control cannot be combined with incarceration. Sanders quotes Francis with approval on this point. Petitioner, however, sees nothing particularly absurd about this result since community control also cannot be combined with incarceration under the first cell. State v. Mestas, 507 So.2d 587 (Fla.1987); Committee Note to Fla.R.Crim.P. 3.701 (d)(13).

Third, as Johnson correctly points out, nothing in the

guidelines allows for split sentences which include both community control and incarceration. The committee notes to Florida Rules of Criminal Procedure 3.701(d)(12) and (d)(13) expressly mention split sentences of (1) incarceration and probation and (2) community control and probation but do not mention a split sentence of incarceration and community control. Consequently, the guidelines, by not expressly mentioning this type of split sentence, in fact exclude it from its field of operation.

> It is, or course, a general principle of statutory construction that the mention of one thing implies the exclusion of another; expressio unius est exclusio alterius. Hence, where a statute enumerates the things on which it is to operate, or forbids certain things, it is ordinarily to be construed as excluding from its operation all those not expressly mentioned.

Thayer v. State, 335 So.2d 815,817 (Fla.1986) Contrary to both Francis and Sanders, then, split sentences of incarceration and community control may not be imposed for any cell of the guidelines, absent written reasons for departure.

Fourth, Francis assumes that, since community control is more like probation, community control can be substituted for probation in a guideline sentence. Mestas, however, clearly teaches that these dispositional alternatives are not interchangeable. "Community control, which is a harsh and more severe alternative to ordinary probation, is a departure sentence when the guidelines call for any 'nonstate prison sanction.'" Mestas 507 So.2d at 588.

Fifth, the present case reasons that community control is more like probation because community control, like probation, is not limited by time and, like probation, can be "imposed for a

period not to exceed the term provided by general law." Welch, 13 F.L.W. at 383. This reasoning, however, is plainly wrong since community control can never be imposed for a period longer than two years. §948.01(5) Fla.Stat. (1987). Community control is therefore plainly different from probation in this respect.

Sixth, the committee note to Florida Rule of Criminal Procedure states that "[c]ommunity control is a viable alternative for any state prison sentence less than twenty-four (24) months without requiring a reason for departure" (emphasis added). This committee note does not say that community control is a viable addition to any state prison sentence less than twenty-four (24) months without requiring a reason for departure. Yet, this is precisely what the second district would have this committee note say.

Seventh, to the extent that the relevant statutes and rules are ambiguous, the second district's reasoning violates the rule of lenity, which states "that courts must resolve all doubts in favor of the accused." Carawan v. State, 515 So.2d 161, 165 (Fla.1987).

For these reasons, this court should reject the second district's reasoning and adopt the reasoning of the fifth district in Johnson. In the present case, the court should strike the period of community control, because the trial judge stated orally that he could see no valid reasons for departure from the guidelines. (R36)

ISSUE II

A FINE WAS IMPOSED WITHOUT THE REQUIRED STATUTORY FNDINGS.

The instant offense was committed on August 8, 1982, prior to October 1, 1983. (R1) In addition to imprisonment, Welch was ordered to pay a fine of $1000. (R40) According to section 921.005(2) Florida Statutes (1985), the court was required to determine whether (1) Welch was able to pay the fine, (2) Welch would be able to pay the fine, (3) imposition of the fine would prevent Welch from being rehabilitated or making restitution (4) Welch had derived a pecuniary benefit from his crime, and (5) the fine was specially adapted to deterrence, punishment, or rehabilitation. The court failed to consider these criteria. This failure to consider the mandatory statutory criteria for sentencing was error. State v. Rhoden, 448 So.2d 1013 (Fla.1984).

The fine was made a part of both the written sentence and the order imposing community control. (R40,49) This sentencing error apparent from the four corners of the record is appealable despite the lack of objection below. State v. Whitfield, 487 So.2d 1045 (Fla.1986). That this fine was first imposed in 1983 and then reimposed in 1986 (R36) without objection makes no difference. Even assuming, arguendo, that the trial judge carefully considered the mandatory criteria in 1983 (and, of course, he did nothing of the kind), Welch's financial circumstances may have changed in the intervening three years. Consequently, the judge was required to reconsider the criteria in 1986 before reimposing the fine.

CONCLUSION

Petitioner requests this court to remand to the trial court with instructions to vacate the fine and community control that were imposed on him.

Respectfully submitted,

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