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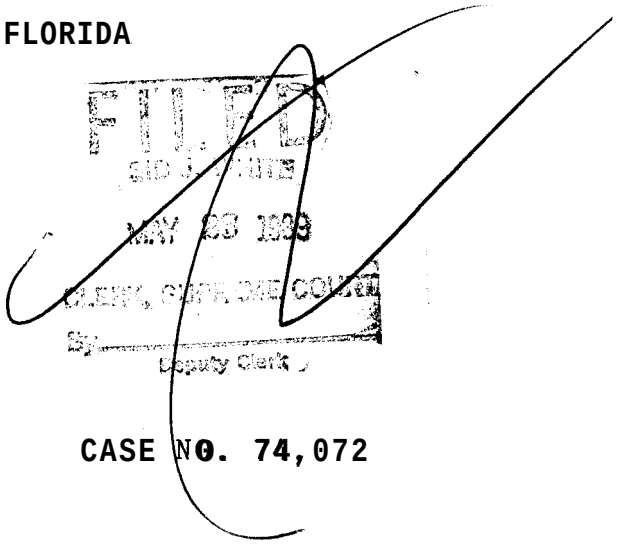
IN THE SUPREME COURT OF FLORIDA



DARRYL A. SINGLETON,

Petitioner,

versus

STATE OF FLORIDA,

Respondent.

CASE NO. 74,072

PETITIONER'S BRIEF ON THE MERITS

JAMES B. GIBSON, PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

BRYNN NEWTON
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ATTORNEY FOR PETITIONER

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STATEMENT OF THE CASE AND FACTS

Petitioner was charged by an information filed in the Circuit Court of Volusia County, Florida, with burglary of a conveyance and grand theft, second degree. (R 37) On April 21, 1988, he entered a plea of nolo contendere to burglary of a conveyance. (R 3-27) On June 14, 1988, he was placed on five years' probation, including a condition that he spend 270 days in the Volusia County Jail, and providing that both the 270 days in jail and the remainder of his probation be served consecutively to incarceration imposed in a previous case. (R 33-35, 41-44)

Notice of appeal was timely filed on June 29, 1988, and the Office of the Public Defender was appointed to represent Appellant on appeal. (R 45, 51) On March 23, 1989, upon Respondent's motion for rehearing, the Fifth District Court of Appeal affirmed the consecutive sentence imposed by the trial court and certified the decision herein to be in conflict with Kline v. State, 509 So.2d 1178 (Fla. 1st DCA 1987). Singleton v. State, 14 F.L.W. 754 (Fla. 5th DCA March 23, 1989). Petitioner's notice to invoke this Honorable Court's discretionary jurisdiction was filed in the District Court on April 21, 1989.

SUMMARY OF ARGUMENT

Although the condition that Petitioner spend 270 days in the Volusia County Jail as a condition of five years' probation did not exceed the sentencing guidelines' recommended range of any non-state prison sanction, the order that he serve the jail time consecutively to another 270-day county jail sentence violated Section 922.051's limitation of county jail sentences to no more than one year. Section 922.051 was not superseded by the enactment of the sentencing guidelines but, insofar as Section 922.051 may be in conflict with provisions of the sentencing guidelines, as suggested by the District Court's opinion herein, it must be construed in favor of the accused so as to afford Petitioner the benefit of limiting his incarceration in the county jail as consecutive conditions of probation to no more than one year,

ARGUMENT

THE TRIAL COURT ERRED BY IMPOSING AS A CONDITION OF PROBATION 270 DAYS IN THE COUNTY JAIL WHICH, BECAUSE IT WAS ORDERED TO BE SERVED CONSECUTIVELY TO ANOTHER 270-DAY PERIOD OF INCARCERATION, EXTENDED PETITIONER'S TOTAL COUNTY JAIL SENTENCE BEYOND ONE YEAR, IN VIOLATION OF SECTION 922.051, FLORIDA STATUTES (1987).

Petitioner's sentencing guidelines point total for burglary of a conveyance was 27, placing his presumptive sentence within the range of any non-state prison sentence. Rule 3.988(e), Fla.R.Crim.P. (R 40) In apparent compliance with the sentencing guidelines' recommended range, the trial court placed Appellant on five years' probation, including the condition that he spend 270 days in the Volusia County Jail and crediting him for 131 days' time served previously. (R 33-35, 41-42) The trial court, however, provided that:

> XX This Judgment and Sentence is to run consecutive with Sentence imposed in Docket #87-6212, Count I*.
>
> *Specifically, the probationary term as well as the 270 days with credit for the 131 days time served is to begin only after the completion of the service of the 270 days sentence imposed in Case 87-6212, Count I.

(R 42)

Section 922.051 provides:

> Imprisonment in county jail, term of 1 year or less.--When a statute expressly directs that

> imprisonment be in a state prison, the court may impose a sentence of imprisonment in the county jail if the total of the prisoner's cumulative sentences is not more than 1 year.

Likewise, Sections 921.187(1)(e) and 948.03(7) indicate that the length of any incarceration in a county jail is limited to 364 days, or one year. The District Court in Kline v. State, 509 So.2d 1178 (Fla. 1st DCA 1987), held that a consecutive felony sentence of 364 days in the county jail as a condition of fifteen years' probation violated Section 922.051 because its being consecutive to a 364-day sentence for a misdemeanor offense extended Kline's jail time beyond one year. Id., 509 So.2d at 1180.

The Kline Court supported its conclusion upon this Honorable Court's decision in Dade County v. Baker, 265 So.2d 700 (Fla. 1972), which adopted the dissent in Dade County v. Baker, 258 So.2d 511 (Fla. 3d DCA 1972), which had found no reasonable basis for concluding that the statutory prohibition against imprisoning a defendant in the county jail for more than one year applies only to cumulative sentences resulting from one indictment or information. Judge Carroll wrote:

> In the light of such considerations it would appear that the statutory prohibition against imposing cumulative (felony) sentences which would imprison a person in the county jail for a period of more than one year necessarily should be applicable to cumulative one year sentences for offenses that were charged and prosecuted under separate indictments or informations

> as well as to sentences for such offenses that result from a prosecution under a single charging instrument.

Dade County v. Baker, 258 So.2d at 514; Kline v. State, 509 So.2d at 1181-1182.

In this case, the Fifth District Court of Appeal found that Section 922.051 is not applicable to Petitioner's sentencing for burglary, because it has been superseded or reversed by the enactment of the sentencing guidelines. Judge Cobb wrote:

> . . . The applicable statutes herein are the sentencing guidelines, which expressly directed that [Petitioner] not be imprisoned in state prison. The instant situation is analogous to the computation of misdemeanor jail time, which has never been part of the equation used to determine a section 922.051 violation. See Gwynn v. Orange County Board of County Commissioners, 527 So.2d 866 (Fla.' 5th DCA 1988) and Mancebo v. State, 338 So.2d 268 (Fla. 3d DCA 1976).
>
> The case relied upon by [Petitioner], Dade County v. Baker, 265 So.2d 700 (Fla. 1972) is not relevant to a post-1983 case governed by the sentencing guidelines. As pointed out by Associate Judge Miner is his discerning dissent in Kline v. State, 509 So.2d 1178 (Fla. 1st DCA 1987), the policy considerations underlying section 922.051--i. e., discouraging use of county jails when sentencing felons--ceased to exist with the advent of the sentencing guidelines. Indeed, the policy has now been reversed: "[G]uidelines sentencing seems premised on discouraging use of state penal facilities for

> [felons]." Kline at 1184 (Miner, J., dissenting). The majority opinion in Kline relied on section 922.051, but overlooked subsequent and superseding statutory enactments in the form of the sentencing guidelines.

Id., 14 F.L.W. 754. (Emphasis in original.) (Footnote omitted.)

Petitioner was sentenced pursuant to the sentencing guidelines and pursuant to Section 775.082(3)(d), which provides for up to five years' imprisonment for a felony of the third degree. The Gwynn and Mancebo decisions analogized by the Fifth District Court of Appeal to this situation were cases construing the propriety of sentencing for misdemeanors. A misdemeanor is defined as a crime that would be punishable by a term of imprisonment in a **county** correctional facility; a felony is a crime that is punishable by imprisonment in a **state** correctional facility. ss. 775.08(2) and 775.08(1), Fla.Stat. (1987). See also, Gwynn, supra, which observed that the decision in Dade County v. Baker, 265 So.2d 700 (Fla. 1972), was premised on the fact that Section 922.051 is concerned with sentences for **felonies.**

Petitioner respectfully submits that the Kline majority did not overlook the subsequent enactment of the sentencing guidelines which the Fifth District Court of Appeal ruled had superseded Section 922.051, but specifically addressed the lack of "coordination" between Section 922.051 and the criminal rule which established "any nonstate prison sanction" as the recommended range for Petitioner's sentence. Rule 3.988(e),

Fla.R.Crim.P. See also, The Florida Bar Re: Rules of Criminal Procedure (Sentencing Guidelines, 3.701, 3.988), 482 So.2d 311 (Fla.1985). The District Court in Kline noted that the sentence to the county jail as a condition of fifteen years' probation for a second-degree felony did not constitute a departure from the recommended guidelines sentence of "any nonstate prison sanction," but the cumulative effect of the 364-day county jail sentences violated Section 922.051, and found there was a "manifest need for legislative coordination in this area of the law." The Kline Court, however, concluded that "the needed legislative coordination and clarification is more properly left to the legislature." Id., 509 So.2d at 1182. In the meantime, provisions of the penalties statute and statutes defining offenses shall be strictly construed but, when the language of criminal provisions is susceptible of differing constructions, as it is here, the provisions shall be construed most favorably to the accused. s. 775.021(1), Fla.Stat. (1987). Petitioner's 270-day jail sentence as a condition of probation should have been vacated and reduced to no more than ninety-five days in jail.

CONCLUSION

For the reasons expressed herein, Petitioner respectfully requests that this Honorable Court reverse the decision by the Fifth District Court of Appeal herein, and vacate that portion of the probation order herein which requires that he spend 270 days in the county jail.

Respectfully submitted,

JAMES B, GIBSON, PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to the Honorable Robert A. Butterworth, Attorney General, by delivery to his basket at the Fifth District Court of Appeal; and by mail to Mr. Darryl Singleton, P. O. 628, Lake Butler, Florida 32054, this 22nd day of May, 1989.

ATTORNE