12-11 O/A 1-9-90

IN THE SUPREME COURT OF FLORIDA

KENNETH SKEENS,

Petitioner,

vs.

Case No. 74,211

STATE OF FLORIDA,

Respondent.

_____/

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

BRIEF OF RESPONDENT ON THE MERITS

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SUPPLEMENTAL STATEMENT OF THE CASE AND FACTS

Respondent offers the following to supplement petitioner's statement of the case and facts:

The written judgment and sentence indicate that petitioner was placed on community control for two years with a consecutive ten-year period of probation (R 24, 35-38). However, the trial court orally stated at sentencing that petitioner was "hereby sentenced to twelve years probation, the first two years of which shall be on community control" (R 49). Prior to imposition of the sentence, the assistant state attorney had suggested that the court sentence petitioner "to twelve years probation with a condition of that probation that the first two be on community control" (R 45). Even though the guidelines scoresheet is not included in the record, it appears that the presumptive range was 12-30 months incarceration in the state prison, or community control (R 41). The state offered two alternatives: Two years in the Florida State Prison or twelve years probation with a specified condition of two years community control (R 40). Petitioner chose the second option in order to avoid a prison term (R 41).

SUMMARY OF THE ARGUMENT

Issue I: The amended committee note to **Florida Rule** of **Criminal Procedure 3.701(d)(13),** allowing the imposition of community control and probation in tandem, was enacted into law by legislative adoption and implementation of this Court's proposed guidelines amendments. The amended rule clarifies the law in regard to sentencing alternatives rather than altering the statutory scheme of **Chapter 948** and **section 921.187, Florida Statutes (1987),** and comports with legislative purpose and intent. Furthermore, if conflict exists, the sentencing guidelines should prevail. Application of the rule in petitioner's case does not violate the ex post facto prohibition, because petitioner could have received a harsher sentence of imprisonment.

Issue 11: Convictions for possession of a firearm by a convicted felon and carrying a concealed firearm do not violate double jeopardy protections. The two offenses are separate according to **section 775.021, Florida Statutes (1987),** because each offense contains a statutory element the other does not. Nor does the application of the analysis established in **Carawan v. State, 515** So.2d **161** (Fla. 1987), warrant a different conclusion because the two statutes address different evils and seek to remedy different problems.

ARGUMENT

ISSUE I

WHETHER THE TRIAL COURT ERRED IN IMPOSING COMMUNITY CONTROL IN TANDEM WITH PROBATION ON THE CHARGE OF FELON IN POSSESSION OF A FIREARM? (As stated by Petitioner).

This Court has clearly approved the imposition of community control in tandem with probation by adoption of the December 19, 1985, **committee note amendment to Florida Rule of Criminal Procedure 3.701(d)(13).** **The Florida Bar re: Rules of Criminal Procedure (Sentencing Guidelines), 3.701, 3.988)**, 482 So.2d 311 (Fla. 1985). The **committee note to Rule 3.701(d)(13)** provides in part:

> It is appropriate to impose a sentence of community control to be followed by a term of probation. The total sanction (community control and probation) shall not exceed the term provided by general law.

The above amendment became effective on October 1, 1986, after approval by the legislature. **Chapter 86-273,** Laws **of Florida.**

On the charge of felon in possession of a firearm, a second degree felony, the trial court imposed a two-year period of community control to be followed by a ten-year period of probation (R 24, 35-38, 49). The sentencing guidelines presumptive range was apparently twelve to thirty months imprisonment or community control (R 29, 41). Therefore, petitioner's sentence was within the recommended guidelines and did not exceed the fifteen year term provided by general law for

second degree felonies. **Sections 775.082(3)(c) and 790.23(3), Florida Statues (1987).**

The conflict in opinion among the district courts arose from different interpretations of **sections 921.187 and 948.01, Florida Statutes (1983),** and existed prior to the guidelines amendment. In **Williams v. State,** 464 So.2d 1218 (Fla. 1st DCA 1984), the first district considered the interplay between **sections 948.01** and **921.187, Florida Statutes,** and concluded that the legislature has established community control and probation as mutually exclusive alternative forms of disposition which therefore may not be imposed in tandem. See also **Mitchell v. State.** 463 So.2d 416 (Fla. 1st DCA), **cause dismissed,** 469 So.2d 750 (Fla. 1985). The fourth district, without analysis, agreed with **Williams** in **Chessler v. State,** 467 So.2d 102 (Fla. 4th DCA 1985). The second district, in **Burrell v. State,** 483 So.2d 479 (Fla. 2d DCA 1986), disagreed with the reasoning in **Williams** that community control was intended to afford an alternative to both probation and incarceration and that a disposition involving both community control and probation would be manifestly contrary to the legislative intent as to the proper purpose and application of alternative dispositions. The **Burrell** court felt, instead, that

> Community control, though an individualized program with the offender restricted within the community, essentially functions as a more restrictive form of probation. Like probation, it is supervised by the Department of Probation and Parole. A violation is subject to the same sort of disposition as a violation of probation. We feel that in this instance community control represents an

> intermediate step, between total incarceration and freedom on the streets, in the chain of rehabilitation of the offender.

483 So.2d at 481. In **Petras v. State**, 486 So.2d 44 (Fla. 5th DCA 1986), the fifth district, citing **Burrell** and **Smith v. State**, 484 So.2d 581 (Fla. 1986), also found no error in the imposition of a sentence of two years community control on the condition that the defendant serve sixty days in the county jail, followed by three years probation.

In the case at bar, the second district continues to adhere to its earlier **Burrell** holding allowing the imposition of community control and probation in tandem. **Skeens v. State**, 542 So.2d 436 (Fla. 2d DCA 1989). The **Skeens** opinion did not address the amendment to **Rule 3.701(d)(13)**. In **Reed v. State**, 545 So.2d 892 (Fla. 4th DCA 1989), the fourth district was bound by its earlier ruling in **Chessler** to reverse a sentence of one year of community control to be followed by two years probation. However, in light of the amendment to the committee note, the **Reed** court certified the question as one of great public importance. **Reed** is now pending before this Honorable Court as **State v. Reed**, (Fla., Case No. 74,562). In the recent case of **Denson v. State**, 14 F.L.W. 2053 (Fla. 1st DCA Sept. 1, 1989), the first district adhered to its earlier ruling in Williams, supra, and continued to assert that community control and probation are alternative forms of disposition which may not be imposed in tandem. The **Denson** court acknowledged the amended committee

note, but held that the committee note cannot alter the statutory scheme of **Chapter 948** and **section 921.187, Florida Statutes,** as delineated in **Williams.** The original **Denson** opinion was withdrawn on September **25, 1989,** by Order of the Court. **Denson v. State, 14** F.L.W. **2339** (Fla. 1st DCA Sept. **25, 1989). State v. Denson,** (Fla., Case **No. 74,681),** is also pending before this Court, which relinquished jurisdiction to the first district on October **31, 1989,** and ordered that court to enter a new opinion.

Respondent urges this Court to hold that community control and probation may be imposed consecutively and thus affirm the second district's well-reasoned decision in **Skeens v. State,** supra. First, **sections 948.01** and **921.187, Florida Statutes (1987)** should not be construed so as to make community control and probation mutually exclusive sentencing dispositions. **Section 921.187,** while not listing combined terms of community control and probation as a sentencing alternative, does not expressly prohibit such a disposition scheme. **Subsection (1)(m)** allows the sentencing court to "[m]ake any other disposition that is authorized by law." Petitioner cites **Benyard v. Wainwright, 322** So.2d **473** (Fla. **1975)** for the proposition that a statutory provision regarding concurrent and consecutive sentences prevails over a conflicting rule of criminal procedure because the subject of sentencing is substantive law. **Benyard** is clearly distinguishable, however, because **Florida Rule** of **Criminal Procedure 3.722** was in direct conflict with **section 921.16, Florida Statutes (1973),** and was not related to the sentencing

guidelines, which were enacted some ten years later. Respondent asserts that the sentencing guidelines law should take precedence over the alternative sentencing statutes if a conflict is found to exist. The guidelines laws were enacted subsequent to **sections 948.01** and **921.187** and are thus the latest expressions of legislative intent. In addition, this case may be analogized with **Whitehead v. State, 498** So.2d **863** (Fla. **1986),** wherein this Court held that the guidelines law supersedes the earlier statute dealing with habitual offenders. The addition of the dispositional alternative of community control followed by probation, rather than impermissibly altering the statutory scheme of **Chapter 948** and **section 921.187,** is in full keeping with the legislative intent as to the proper purpose and application of alternative dispositions. **Section 921.187(1)** states that the enumerated alternatives "shall be used in a manner which will best serve the needs of society, which will punish criminal offenders, and which will provide the opportunity for rehabilitation." The legislative purpose is satisfied in circumstances such as those in the instant case, where long-term placement in a community-based sanction is a desirable alternative to imprisonment, but the more restrictive supervision of community control is necessary "up front" to best meet the needs of society, and the punishment and rehabilitation of the offender. That community control followed by probation is a suitable alternative disposition is also evidenced by the legislature's **1986** adoption of the change in **Florida Rule** of

Criminal Procedure 3.701(d)(13), which deleted the previous provision that community control "is a sanction which the Court may impose upon a finding that probation is an unsuitable disposition." The first district in **Mitchell,** supra, expressly relied on that former provision in holding that the two dispositions are mutually exclusive. **463** So.2d at **419.**

In **Reed v. State,** supra, Judge Letts noted in his specially concurring opinion that upon reflection, he found it difficult to justify a requirement that a defendant must go to prison to be put on a term of successive probation. **545** So.2d at **892.** The imposition of community control and probation in tandem represents a middle ground between the harsh disposition of imprisonment and the almost total freedom of probation, and does nothing to increase the serious prison overcrowding situation in this state. As such, this alternative disposition comports with legislative intent as expressed in **Chapter 948, section 921.187,** and the sentencing guidelines. Therefore, the disposition in the case at bar should be affirmed.

Petitioner argues that even if this Court uphold the viability of in-tandem imposition of community control and probation, the application of the guidelines amendment in this case violates the ex post facto doctrine. This argument is without merit, however. In **Miller v. Florida, 482** U.S. **423, 107** S.Ct. **2446, 96** L.Ed.2d **351 (1987),** the United States Supreme Court stated that in order for a criminal law to fall within the ex post facto prohibition, the law must be retrospective and it

must disadvantage the offender affected by it. 482 U.S. at 430. Assuming, arquendo, that the committee note to **Rule 3.701(d)(13)** represents a substantive change in the law, it cannot be said to be disadvantageous to petitioner or other like-situated defendants. The second cell of the sentencing guidelines scoresheet in all categories calls for 12-30 months incarceration or community control. **Florida Rule of Criminal Procedure 3.988.** Consequently, any defendant who falls within that sentencing range faces the possibility of incarceration in the Florida State Prison for up to two and one half years. Furthermore, the court in this case could have imposed an additional term of probation of up to 12 ½ years as a lawful split sentence. Committee note to **Rule 3.701(d)(12) of the Florida Rules of Criminal Procedure; State v. Holmes**, 360 So.2d 380 (Fla. 1978). Also, petitioner could have been placed on probation for fifteen years with the special condition that he spend the first 364 days in the county jail or other approved local facility. **Section 921.187(1)(d), Florida Statutes (1987); Wright v. State, 355** So.2d 870 (Fla. 2d DCA 1978).

It is important to note that petitioner's sentence in this case resulted from a plea agreement. In return for petitioner's guilty plea to one count of felon in possession of a firearm and one count of carrying a concealed firearm, the state offered two alternatives: two years in the Florida State Prison or twelve years probation with a specified condition of two years community control (R 40). Petitioner chose the second option expressly in

order to avoid the harsher prison term (R 41). Although community control is a form of intensive supervised custody, that sanction essentially functions as a more restrictive form of probation, Burrell, 483 So.2d at 481, and is therefore less harsh than incarceration. The possibility of incarceration as a second cell guidelines sentence existed at the time petitioner committed the offenses in February, 1985, and petitioner has therefore not been disadvantaged by the amended committee note. Accordingly, there is no ex post facto violation.

ISSUE II

WHETHER THE TRIAL COURT'S IMPOSITION OF PUNISHMENT ON BOTH THE CHARGE OF FELON IN POSSESSION OF A FIREARM AND THE CHARGE OF CARRYING A CONCEALED FIREARM, WHEN THE CHARGES AROSE OUT OF THE SAME ACT, VIOLATED PETITIONER'S RIGHT TO NOT BE PLACED IN DOUBLE JEOPARDY? (As stated by Petitioner).

The trial court correctly imposed separate punishments for felon in possession of a firearm and carrying a concealed firearm. **Section 790.23, Florida Statutes (1987),** prohibits the possession of a firearm by a convicted felon:

> It is unlawful for any person who has been convicted of a felony in the courts of this state or of a crime against the United States which is designated as a felony or convicted of an offense in any other state, territory, or country punishable by imprisonment for a term exceeding 1 year to own or to have in his care, custody, possession, or control any firearm or electric weapon or device or to carry a concealed weapon, including all tear gas guns and chemical weapons or devices.

Carrying a concealed firearm is prohibited by **section 790.01(2), Florida Statutes (1987):**

> Whoever shall carry a concealed firearm on or about his person shall be guilty of a felony of the third degree.

The above offenses are separate and distinct according to **section 775.021(4), Florida Statutes (1987),** because "each offense requires proof of an element that the other does not, without regard to the accusatory pleading or the proof adduced at trial." A convicted felon could be guilty of violating **section 790.23** by

merely owning a firearm, without actually carrying the weapon on his person. On the other hand, a person may be convicted of carrying a concealed firearm without having been convicted of a felony. Under the analysis established in Carawan v. State, 515 So.2d 161 (Fla. 1987), legislative intent to impose multiple punishments is clear, because the two offenses, although they often accompany one another, address separate evils. The most recent, and possibly only, case on point comes from the third district in Johnson v. State, 535 So.2d 651 (Fla. 3d DCA 1989). In that case, the court upheld separate convictions and sentences for possession of a firearm by a convicted felon, carrying a concealed firearm, and possession of a short-barreled rifle, all based on the same act. The court applied the analysis in Carawan, supra, because the offenses in Johnson were committed prior to the effective date of the revisions in section 775.021, Florida Statutes (1987). The court did comment that the result would be the same under pre-Carawan case law, under Carawan, or under the recently enacted statute. 535 So.2d at 653, n.3. The third district's ruling was based on the reasoning that each statute addresses a different evil and seeks to remedy a different problem. The court stated that the convicted felon statute is

> . . . aimed at particular persons, namely, those who "by their past conduct, had demonstrated their unfitness to be entrusted with such dangerous instrumentalities ...." *Nelson v. State,* 195 So.2d 853, 855 n. 8 (Fla. 1987) (quoting with approval *Cases v. United States,* 131 F.2d 916, 921 (1st Cir. 1942)).

As to the concealed firearm statute, **section 790.01(2),** the court said:

> . . . The concealed firearm statute is obviously aimed at the evil of concealment, that is, having on hand a weapon of which the public is unaware and which might be used in a fit of passion. 79 Am.Jur.2d *Weapons and Firearms* § 8 (1975). *See also Carlton v. State,* 63 Fla. 1, 8, 58 So. 486, 488 (1912).

The second district agreed with **Johnson** in the instant case, finding that possession of a firearm by a convicted felon and carrying a concealed firearm are separate offenses for which separate convictions and punishments may be imposed. Respondent urges this Court to approve the reasoning in **Johnson** and **Skeens** and affirm the dual convictions in this case.

CONCLUSION

Based upon the foregoing facts, arguments and citations of authority, the decision of the Second District Court of Appeal in **Skeens** v. State, 542 So.2d 436 (Fla. 2d DCA 1989) should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Jennifer Y. Fogle, Assistant Public Defender, Polk County Courthouse, P. O. Box 9000-Drawer PD, Bartow, Florida 33830, this 16th day of November, 1989.

OF COUNSEL FOR RESPONDENT