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IN THE SUPREME COURT OF FLORIDA

HENRY LANE,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

Case No. 78,534

PETITIONER'S BRIEF ON THE MERITS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **PAGE**

OTHER AUTHORITIES

FLORIDA STATUTES

FLORIDA CONSTITUTION

UNITED STATES CONSTITUTION

PRELIMINARY STATEMENT

Petitioner was the defendant in the Criminal Division of the Circuit Court of the Seventeenth Judicial Circuit, In and For Broward County, Florida, and the appellee in the Fourth District Court of Appeal. Respondent was the prosecution and the appellant below.

In the brief, the parties will be referred to as they appear before this Honorable Court.

The following symbol will be used:

R = Record on Appeal

STATEMENT OF THE CASE AND FACTS

Petitioner Henry Lane was charged by Information filed January 24, 1990 with purchase of cocaine at or near a school (R 19-20). Sections 893.03(2)(a)(4) and 893.13(1)(e), Florida Statutes (1989). On September 5, 1990, Petitioner withdrew his initial plea of not guilty and entered a plea of nolo contendere to purchase of cocaine at or near a school (R 21-22).

At the change of plea hearing, Mr. Lane testified that on the date of the incident, he had been at a party smoking marijuana and had left to buy more (R 9-10). Prior to the incident, he had been smoking marijuana fairly often (R 10-11). He had previously been convicted of possession of cocaine. He was placed on one year of probation as a result of that 1987 conviction (R 5-6). Mr. Lane testified that he regularly smoked marijuana on the weekends for one year prior to his arrest in this case (R 12). He said that he had been drinking wine as well as smoking reefer at the party. He thought he was buying marijuana. He stated he didn't know where he was when he made the buy (R 10-12). He did not try to run from the police when he was arrested (R 9).

After explaining the terms and consequences of the change of plea, the trial judge accepted the change of plea (R 12-13). The judge told Mr. Lane that the prosecution intended to appeal the case. The judge stated that should the state be successful on appeal, Mr. Lane would be given the opportunity to withdraw his plea (R 7).

The judge specifically found that Mr. Lane was drug dependent pursuant to Section 397.12, Fla. Stat. (1989). The trial judge

sentenced Mr. Lane to two (2) years of community control to be followed by three years on probation (R 12-13, 21). The sentence entailed Mr. Lane's placement in the facility for drug dependents. Upon completion of this rehabilitation program, Mr. Lane was to complete the remainder of his time under house arrest (R 13). The judge emphasized that should Mr. Lane fail to complete the rehabilitation program, he would be in violation of the community control or probation and would then face a three (3) year prison sentence (R 13-14).

On direct appeal by Respondent, the Fourth District Court of Appeal reversed the sentence citing the three year mandatory minimum set forth in Section 893.13(1)(e). State v. Lane, Case No. 90-2569 (Fla. 4th DCA June 19, 1991) 16 F.L.W. D1631. In ruling that the three year mandatory minimum under Section 893.13(1)(e) controlled, the District Court held that:

> ...it was not the legislature's intent to have section 397.12 be an exception to the mandatory minimum sentencing requirement of section 893.13(1)(e)...

(Appendix at 3). Petitioner's motion for rehearing and/or certification was denied July 25, 1991 (Appendix 1-11). On August 21, 1991 in State v. Scates, Case No. 90-3174 (Fla. 4th DCA Opinion filed August 21, 1991) the Fourth District Court of Appeal cited State v. Lane, 16 F.L.W. D1631 (Fla. 4th DCA June 28, 1991) and certified the identical issue as a question of great public importance to this Court. State v. Scates, supra, (Appendix 12-14). The certified question is:

> MAY A TRIAL COURT PROPERLY DEPART FROM THE MINIMUM MANDATORY PROVISIONS OF SECTION 893.13(1)(e), FLORIDA STATUTES (1989), UNDER THE AUTHORITY OF THE DRUG REHABILITATION

PROVISION OF SECTION 397.12, FLORIDA STATUTES (1989)

Counsel in Scates filed a notice of intent to invoke discretionary jurisdiction of this Court on August 22, 1991 and Scates is currently pending before this Court (Case No. 78,533). Petitioner thereupon noticed his intent to invoke this Court's discretionary jurisdiction to review this cause on August 26, 1991.

On November 25, 1991, this Court postponed its decision on jurisdiction and ordered briefing by the parties on the merits. This brief on the merits by Petitioner follows.

SUMMARY OF ARGUMENT

Mr. Lane's sentence of two years community control to be followed by three years probation must be affirmed. The trial court had full authority and was within its discretionary powers to so sentence Petitioner. Mr. Lane meets the criteria for application of Section 397.12, Fla. Stat. Specifically, he falls within the classification as a drug dependent amenable to rehabilitation. The most recent expression of legislative will under Chapter 953 (Laws of Florida) as well as recent case authority gives new force to Section 397.12.

Moreover, there was no language placed in the statute stating that the mandatory minimum sentence "shall not be suspended, deferred or withheld," nor was there any language placed in the statute precluding the trial court from staying, suspending, or withholding the mandatory sentence. In fact, there was no language restricting the trial court's discretion in this regard. Furthermore, application of the three year mandatory minimum to Mr. Lane would be cruel and unusual punishment wholly disproportionate to the offense for which Mr. Lane is convicted.

ARGUMENT

THE TRIAL COURT DID NOT ERR IN DEPARTING DOWNWARD FROM THE THREE YEAR MANDATORY MINIMUM SENTENCE OR IN SENTENCING MR. LANE PURSUANT TO SECTION 397.12, FLORIDA STATUTES.

At sentencing, the trial judge found that Petitioner Lane was a drug dependent amenable to rehabilitation pursuant to Section 397.12, Fla. Stat. (1989) (R 12-13, 21). Following his nolo contendere plea to purchasing cocaine within one thousand feet of a school, Mr. Lane was placed on two years of community control to be followed by two years probation (R 12-13, 21). Section 893.13(1)(e), Fla. Stat. (1989). The trial judge did not abuse his discretion herein for a number of reasons. First, statutory analysis of 893.13(1)(e), Fla. Stat. (1989) demonstrates that imposition of the three year mandatory minimum is not absolute. Second, Mr. Lane meets the criteria statutory under Section 397.12 as a drug dependent. The most recent expression of legislative will, via Chapter 953, shows the efficacy of Mr. Lane's original sentence. Third, recent cases have upheld downward departure from the sentencing guidelines where the defendant was, like Mr. Lane, impaired by substance abuse at the time of the crime and, like Mr. Lane, amenable to rehabilitation. Finally, the application of the three year mandatory minimum sentence in Mr. Lane's case would be disproportionate to the offense for which he has been convicted. These points will be addressed sequentially.

This case involves the interplay of Section 397.12, which provides alternatives to incarceration for substance abusers like Mr. Lane, with Section 893.13(1)(e) which imposes the three year

mandatory minimum for purchase of cocaine within one thousand feet of a school.

Comparison of Section 893.13(1)(e), Florida Statutes (1989) with other statutes providing mandatory minimums - a comparison apparently not considered by the Fourth District Court of Appeal in Lane - shows that the three year minimum for selling, purchasing, etc., cocaine within 1,000 feet of a school is not so absolute as the other statutory minimums. Therefore, Section 893.13(1)(e) should not act as an absolute bar to the application of Section 397.12, Florida Statutes (1989), which the trial judge here applied to avoid the minimum.

Section 893.13(1)(e) did not originally provide for a minimum three year sentence. See Section 893.13(1)(e), Florida Statutes (1987). Subsequently, the statute was amended to include subsection (4), which added an additional assessment up to the amount of the statutory fine to be used for drug abuse programs. See Section 893.13(4), Florida Statutes (1989). At the same time, subsection (e)1 was amended to include the three year minimum. Section 893.13(1)(e)1, Florida statutes (1989). The statute now states that the offender "shall be sentenced to a minimum term of imprisonment of 3 calendar years and shall not be eligible for parole or statutory gain-time under s. 944.275 prior to serving such minimum sentence."[1]

It is clear that the legislature intended to impose a minimum three year sentence. However, the legislature failed to include

[1] The minimum has been amended again in a way not relevant here. See Section 893.13(1)(e)(1), Florida Statutes (Supp. 1990).

the operative words found in other penal statutes imposing mandatory minimum terms. The other statutes which include mandatory prison terms all require harsh sentences but further foreclose the court's discretionary power by stating specifically that the sentence shall not be suspended, deferred, or withheld. Because Section 893.13(1)(e) does not include this language, it does not take away the discretionary power of the trial court to suspend, defer, or withhold.

Section 893.135, Florida Statutes (1989), the trafficking statute, requires mandatory minimum sentences when various amounts of controlled substances are possessed, purchased, delivered, etc. It states, "...sentence shall not be suspended, deferred, or withheld, nor shall such person be eligible for parole prior to serving the mandatory minimum term of imprisonment...." Section 784.08, Florida Statutes (1989), concerning possession of a firearm in a felony, also make the same provision that sentence shall not be suspended, deferred, or withheld. By contrast, Section 893.13(1)(e) has been amended since its origin, yet at no time has the legislature provided for or limited the discretionary authority of the sentencing court to suspend, defer or withhold imposition of the minimum three year sentence.

The legislature, when enacting penal statutes is presumed to be aware of prior existing laws. State v. Dunman, 427 So.2d 166, 168 (Fla. 1983). Furthermore, the restriction included by the legislature in other mandatory sentence statutes cannot be implied in Section 893.13(1)(e). As stated in St. George Island, Ltd. v. Rudd, 547 So.2d 958, 961 (Fla. 1st DCA 1989):

> Where the legislature uses exact words and different statutory provisions, the court may assume they were intended to mean the same thing.... Moreover, the presence of a term in one portion of a statute and its absence from another argues against reading it as implied by the section from which it is omitted. [Citations omitted].

Additionally, any ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity. Rewis v. United States, 401 U.S. 808, 812; 91 S.Ct. 1056, 1059; 28 L.Ed.2d 493 (1971). Otherwise put, penal statutes must be construed strictly and never extended by implication. State v. Jackson, 526 So.2d 58 (Fla. 1988). Therefore, the omission from Section 893.13(1)(e) of any language forbidding the court to withhold, suspend, or defer sentence can only be viewed as a grant of authority to allow such suspension, withholding, or deferment of sentence. Based upon the foregoing alone Petitioner contends that the trial judge acted within his discretionary power in imposing sentence. However, there is an additional basis upon which the original sentence herein must be upheld.

In this regard, Petitioner disputes the view of the Fourth District in Lane that Section 397.011(2), Fla. Stat. (1989) applies only to simple possession and not to purchase. By adopting this view, the Fourth District narrowly limited the circumstances in which a sentencer can exercise discretion as to render the force and effect of Section 397.011(2) and Chapter 953 of the statutes as well, a nullity. The Fourth District needlessly confines the sentencer's discretion based upon one phrase in subsection 397.011(2) (emphasis added):

> ...For a violation of any provision of chapter 893, Florida Comprehensive Drug Abuse

> Prevention and Control Act, relating to possession of any substance regulated thereby, the trial judge, may in his discretion, require the defendant to participate in a drug treatment program...

However, this phrase must be considered in the context of the entire subsection, which defines the legislature's intent and has no limiting language at all:

> (2) It is the intent of the Legislature to provide an alternative to criminal imprisonment for individuals capable of rehabilitation as useful citizens through techniques not generally available in state or local prison systems.
>
> * * *
>
> Such required participation may be imposed in addition to or in lieu of any penalty or probation otherwise prescribed by law...

Similarly, the preceding subsection (1) places no limitation on persons dependent on drugs controlled by Chapter 893, of whom Petitioner is one. Subsection (1) more fully delineates the legislature's intent as follows (emphasis added):

> (1) It is the purpose of this chapter to encourage the fullest possible exploration of ways by which the true facts concerning drug abuse and dependents may be made known generally and to provide a comprehensive and individualized program for drug dependents in treatment and after care programs. This program is designed to assist in the rehabilitation of persons dependent on the drugs controlled by chapter 893, as well as other substances with the potential for abuse except those covered by chapter 396. It is further designed to protect society against the social problem of drug abuse and to meet the need of drug dependents for medical, psychological and vocational rehabilitation, while at the same time safeguarding their individual liberties.

Petitioner clearly falls within the ambit of subsection (1).

Furthermore, in Lane the Fourth District focused only on the preamble to Chapter 397, apparently overlooking Section **397.12**, under which Petitioner was sentenced, and Section **397.10**, a further statement of the legislative intent. These provisions state (emphasis added):

> 397.10 Legislative Intent.-- It is the intent of the Legislature to provide a meaningful alternative to criminal imprisonment for individuals capable of rehabilitation as useful citizens through techniques and programs not generally available in state or federal prison systems or programs operated by the Department of Health and Rehabilitative Services. It is the further intent of the Legislature to encourage trial judges to use their discretion to refer persons charged with, or convicted of, a violation of laws relating to drug abuse or a violation of any law committed under the influence of a narcotic drug or medicine to a state-licensed drug rehabilitation program in lieu of, or in addition to, imposition of criminal penalties.
>
> **397.12** Reference **to** Drug Abuse Program.-- When any person, including any juvenile, has been charged with or convicted of a violation of any provision of chapter 893 or of a violation of any law committed under the influence of a controlled substance, the court...may in its discretion, require the person charged or convicted to participate in a drug treatment program....

Reading all of the statutes in pari materia, it is plain that the legislature intended that an offender such as Petitioner could in the trial judge's discretion be placed in drug treatment rather than prison. Consequently, in limiting the sentencer's discretion exclusively to possessory offenses, the Fourth District in Lane overlooked two principles of statutory construction. First,

> "...[i]t is a well settled rule of statutory construction...that a specific statute covering a particular subject matter is controlling over a general statutory provision

> covering the same and other subsections in general terms. .."

Adams v. Culver, 111 So.2d 665, 667 (Fla. 1959) (and cases quoted and cited therein).

Second, where a criminal statute is susceptible of different interpretations, it must be construed in favor of the accused. Lambert v. State, 545 So.2d 838 (Fla. 1989); Weekley v. State, 553 So.2d 239 (Fla. 3d DCA 1989). Applying these principles of statutory analysis to the present facts demonstrate that Mr. Lane's original sentence must be affirmed.

The Fourth District's holding that because Mr. Lane was charged with "purchase" rather than "possession" he could not have the chance for rehabilitation and treatment, (Appendix at 3), effectively emasculates the sentencer's authority and discretion, a result that the legislature could surely not have intended.

The Fourth District aptly noted that Mr. Lane purchased two rocks for $20.00 "...which could reasonably be interpreted to have been purchased for person use only.. ." (Appendix at 3). It is also undisputed that Mr. Lane was under the influence of alcohol and marijuana when they buy occurred.

The evidence here also includes Mr. Lane's testimony that he had been at a party and was going to buy marijuana and return with it to the party. That Mr. Lane mistakenly bought cocaine rather than marijuana speaks volumes about his impairment when this offense was committed (R 9-12).

Petitioner established by his testimony and that of a drug program representative that he was a substance abuser, was under the influence at the time of his offense (R 9-12), and was

therefore eligible for a downward departure from the guidelines under Barbera v. State, 505 So.2d 413 (Fla. 1987) and State v. Sachs, 526 So.2d 48 (Fla. 1988). This Court must affirm the trial court's sentence.

In Barbera v. State, 505 So.2d 413 (Fla. 1987), this Court upheld a downward departure where, as in Mr. Lane's case, substance abuse impaired the defendant's mind at the time of the crime. More recently in State v. Herrin, 568 So.2d 920 (Fla. 1990), this Court stated that substance abuse, coupled with amenability to rehabilitation, could be considered by the sentencer in mitigation. Under criteria set forth in these cases, Mr. Lane established his amenability to rehabilitation by his candid acknowledgment of his drug dependency and by testimony showing that his contact with the criminal justice system arose solely from his drug dependency.

On the basis of Barbera and Herrin, Petitioner's original sentence must be affirmed.

Finally, Petitioner contends that imposition af the three year mandatory minimum sentence would constitute cruel and unusual punishment wholly disproportionate to the severity of the offense. The sentencing guidelines call for a range of three and one-half (3½) to four and one-half (4½) years in state prison for Mr. Lane, an offender without a prior criminal record. The penalty sharply contrasts to the recommended guidelines range for a first offender convicted of burglary of a dwelling (non-state prison sanction), robbery without a weapon (non-state prison sanction), battery on a law enforcement offender (non-state prison sanction), or lewd and lascivious assault upon a child (non-state prison sanction). Thus, the three year mandatory minimum would constitute cruel and unusual

punishment in Mr. Lane's case. Solem v. Helm, 463 U.S. 277, 103 S.Ct. 3001, 77 L.Ed.2d 637 (1983). Amendment XIII, United States Constitution; Article I, Section 17, Florida Constitution.

If this Court does affirm the Fourth District's reversal of Petitioner's original sentence, then it must be with leave for Petitioner to withdraw his plea, since it was entered on the expectation of the reduced sentence. Nichols v. State, 536 So.2d 1052 (Fla. 4th DCA 1988) and State v. Cooper, 510 So.2d 1252 (Fla. 4th DCA 1987).

CONCLUSION

Based on the foregoing arguments and the authorities cited therein, Petitioner respectfully requests this Court affirm the decision of the Fourth District Court of Appeal.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished by courier to Joseph A. Tringali, Assistant Attorney General, Elisha Newton Dimick Building, Room 240, 111 Georgia Avenue, West Palm Beach, Florida 33401 this 3rd day of December, 1991.

Counsel for Petitioner