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IN THE SUPREME COURT OF THE STATE OF FLORIDA

HENRY LANE,

Petitioner,

v. CASE NO. 78,534

STATE OF FLORIDA,

Respondent.

RESPONDENT'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Respondent was the Appellant in the Fourth District Court of Appeal and the Prosecution in the Circuit Court of the Seventeenth Judicial Circuit, Criminal Division, in and for Broward County, Florida. The Petitioner was the Appellee in the Fourth District Court of Appeal, and the Defendant in the Criminal Division of the Circuit Court of the Seventeenth Judicial Circuit, in and for Broward County, Florida.

In the brief, the parties will be referred to as they appear before the Supreme Court of Florida except that Respondent may also be referred to as the State.

The following symbols will be used:

"R" Record on Appeal

"PB" Petitioner's Brief on the Merits

All emphasis has been added unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

Respondent accepts Petitioner's Statement of the Case and Facts (PB 2-4) to the extent that it is true, accurate and nonargumentative, and subject to the following additions and corrections.

1. Following entry of the plea and prior to sentencing, a scoresheet was prepared. The recommended sentence was 3½ to 4½ years in the Department of Corrections. The trial court did not enter a written Order of Departure.

2. The State objected to the sentence (R. 16) on the ground that it violated the three-year mandatory minimum required by Florida Statute 8893.13 and stated that Florida Statute 8397.12 did not apply in the case at bar.

SUMMARY OF ARGUMENT

Petitioner was adjudicated guilty of purchasing cocaine within 1,000 feet of a school. Florida Statute §893.13(1)(e)(1) requires imposition of a mandatory minimum sentence of three calendar years. The trial court could not legally impose a sentence less than the mandatory minimum.

In addition, the appropriate guideline sentence was 3½ to 4½ years. The trial court did not enter a departure order giving contemporaneous written reasons for a downward departure. Therefore, even if a mandatory minimum sentence was not required, the imposition of community control and probation constitutes an illegal downward departure.

The district court was correct in reversing and remanding Petitioner for resentencing to a term which includes the minimum term of imprisonment for three calendar years in accordance with §893.13(1)(e).

ARGUMENT

THE TRIAL COURT ERRED IN FAILING TO IMPOSE EITHER A GUIDELINES SENTENCE OR A THREE YEAR MANDATORY MINIMUM SENTENCE.

In the case at bar, Petitioner pled nolo contendere to purchasing cocaine within 1,000 feet of a school in violation of Florida Statute §893.13(1)(e)(1989). That section requires a mandatory minimum sentence of three calendar years for such a conviction:

> Any person who violates this paragraph ... is guilty of a felony of the first degree ... and shall be sentenced to a minimum term of imprisonment of 3 calendar years and shall not be eligible for parole or statutory gain-time ... prior to serving such minimum sentence.

Florida Statute §893.13(1)(e)(1)

The trial court relied on Florida Statute 8397.12 to circumvent the imposition of the three year mandatory minimum sentence. In relevant part, that statute provides:

> When any person ... has been convicted ... 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, ... If referred by the court, the referral may be in lieu of or in addition to final adjudication, imposition of any penalty or sentence, or any other similar action.

Florida Statute 8397.12

The trial court found that Petitioner qualified as a drug dependent under the provisions of Florida Statute §397.021(6),

and committed him to the Department of Health and Rehabilitative Services for Treatment. Petitioner was sentenced to a period of two years community control followed by three years probation (R. 13).

The Fourth District Court of Appeal held that section 397.12 does not provide an exception to the minimum mandatory sentencing requirement of section 893.13(1)(e). In doing so, the Fourth District Court of Appeal looked at a very similar issue in State v. Ross, 407 So.2d 1380 (Fla. 4th DCA 1989). In Ross, the defendant was found guilty of two firearm offenses requiring a minimum mandatory three year sentence. The trial court therein sentenced the defendant to probatian and a drug rehabilitation program relying on 5397.12 Fla. Stat. In reversing the defendant's sentence, the Ross Court held that §397.12 was not an exception to the mandatory sentencing requirements of the firearm sentencing statutes. 447 So.2d at 1393.

Likewise, and for the same reasons cited in Ross, Florida Statute §397.12 is not an exception to the mandatory minimum three year sentence required after conviction under Florida Statute §893.12(1)(e).

In the first place, §893.13(1)(e)(1) is the later promulgated statute. It took effect as currently written on June 27, 1989. (Ch. 89-524 §3, Laws of Florida). On the other hand, §397.12 first appeared in similar form in 1973 and took effect on July 1, 1973. (Ch. 73-35 Laws of Florida). Therefore, §893.13(1)(e)(1) should prevail as the lust expression of legislative will. As the Fourth District properly stated:

> The legislature, in passing the later statute, is presumed to know the earlier law. And, unless an explicit exception is made for an earlier statute, the later statute controls.

Ross, Id. at 1382.

Secondly, §893.13(1)(e)(1) is unambiguous. The statute clearly states:

> , . . . shall be sentenced to minimum term of imprisonment of 3 calendar years and shall not be eligible for parole or statutory gain time . . .

Florida Statute 893.13(1)(e)(1), emphasis added.

In construing another statute this Court said:

> . . . It is a basic axiom of statutory construction that words of common usage, when appearing in a statute, should be construed in their plain and ordinary sense.

State v. Cormier, 375 So.2d 852, 854 (Fla. 1979).

Thirdly, with regard to the statutes in the case at bar, there is no indication that the legislature intended 8397.12 to serve as an exception to the mandatory term of imprisonment required by §893.13(1)(e)(1). Section 893.15 which provides for drug treatment in lieu of incarceration pursuant to §397.12 is specifically limited to cases involving possession. (See State v. Edwards, 456 So.2d 575 [Fla. 2nd DCA 1984]). The case at bar involves purchase within 1,000 feet of a school. Thus, §893.15, even if it were cited by the trial court in support of its sentence, simply does not apply here.

Petitioner contends that the trial court should have been allowed to downwardly depart from the guideline sentences under section 397.12, Fla. Stat. He argues that surely the legislative

intent was not to punish someone like himself nor to remove the discretion of the trial court. Respondent disagrees with the Petitioner's reasoning.

Assuming that there is some inconsistency between section 397 and section 893, then the statutes should be given the effect designed for them unless a contrary intent clearly appears. State v. Gadsden Country, 63 Fla. 620, 629, 58 So. 232, 235 (1912); State v. Dunmann, 427 So.2d 166 (Fla. 1983). There is no positive or irreconcilable repugnancy between the provisions of section 397 and section 893. The first rule of statutory construction is that words are to be given their plain meaning. It is equally axiomatic that an interpretation of a statute which leads to an unseasonable or ridiculous conclusion or a result obviously not designed by the legislature will not be adopted. Drury v. Harding, 461 So.2d 104 (Fla. 1984). Furthermore, "when two statutes are inconsistent or in conflict, a more specific statute covering a particular subject is controlling over a statutory provision covering the same subject in more general terms." American Healthcorp of Vero Beach, Inc. v. Department of Health and Rehabilitative Services, 471 So.2d 1312, adopted 488 So.2d 824 (Fla. 1st DCA 1985). In such a case, the more narrowly-drawn statute operates as an exception to or qualification of the general terms of the more comprehensive statute. Floyd v. Bentley, 496 So.2d 862, review denied, 504 So.2d 767 (Fla. 2d DCA 1986).

Section 397.12, Fla. Stat. (1989) refers to those people who have been convicted of a violation of any provision of Chapter

893. This is a statute which is general in its terms as it refers in general to the law of the subject or generally to section 893. U.S. v. Rodriguez-Rodriguez, 86 F.2d 830 (1th Cir. 1989). However, section 893.15, which was enacted in 1973 and became effective on July 1, 1973, states that a person who violates section 893.13(1)(f) or (1)(g) relating to possession may be required to participate in a drug rehabilitation program pursuant to chapter 397 at the discretion of the trial judge. Ch. 73-331, Laws of Florida. Statutes relating to the same subject and having the same purpose should be construed together if they are compatible, particularly where statutes are enacted at the same legislative session. Prichard v. Jax Liquors, Inc., 499 So.2d 926, review denied, 511 So.2d 298 (Fla. 1st DCA 1986). Reading the two statutes in pari materia under the statutory construction principle of "ejusdem generis" where general words or principles, when appearing in conjunction with particular classes of things, will not be considered broadly, but will be limited to the meaning of the more particular and specific words, it is clear that the legislative intent was to limit section 397.12 to those defendants who violate section 893.13(1)(f) ok (1)(g). This is also consistent with the general principal mentioned above that when two statutes are inconsistent or in conflict, a mare specific statute covering a particular subject is controlling over a statutory provision covering the same subject in more general terms.

Finally, since the trial court did not enter a contemporaneous written order stating its reasons for a downward

departure, the case must be remanded. Ree v. State, 565 So.2d 1329 (Fla. 1990) On remand, Petitioner must be sentenced in accordance with the guidelines. Pope v. State, 561 So.2d 554 (Fla. 1990); Cheshire v. State, 568 So.2d 908 (Fla. 1990)

CONCLUSION

Based upon the foregoing reasons and citations of authority it is respectfully requested that the District Court's decision be AFFIRMED.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing "Answer Brief of Appellee" has been furnished by courier to: ELLEN MORRIS, Assistant Public Defender, The Governmental Center, 301 N. Olive Avenue, 9th Floor, West Palm Beach, Florida 33401, this 20th day of December, 1991.

Of Counsel

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