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FILED
SID J. WHITE
MAR 5 1992
CLERK, SUPREME COURT
By
Chief Deputy Clerk

IN THE SUPREME COURT OF THE STATE OF FLORIDA

JEAN MAX LIATAUD,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

CASE NO. 78,626

PETITIONER'S INITIAL BRIEF ON THE MERITS

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PREL 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 appellant in the Fourth District Court of Appeal. Respondent was the prosecution and the appellee below. In the brief, the parties will be referred to as they appear before this Court of Appeal.

The following symbol will be used:

"R" Record on Appeal

All emphasis is added.

STATEMENT OF THE CASE AND FACTS

Petitioner was charged by information with purchase of cocaine within 1000 feet of a school, in violation of Section 893.13(1)(e) and 893.03(2)(a)4, Fla. Stat. (1989) (R 21). At the plea hearing in this case, Petitioner testified that he was intoxicated at the time he committed the instant offense (R 12). His wife advised the trial court that Petitioner had a one year history of crack cocaine abuse (R 9). At the time of his arrest on this charge, Petitioner had been using crack cocaine weekly over a period of one year and spending approximately $300 biweekly on the drug (R 10).

Following Petitioner's plea of guilty to purchase of cocaine within 1000 feet of a school, Petitioner was adjudged guilty of that offense (R 34) and placed on prabation for a period of five years (R 34, 35), with special conditions that he refrain from using drugs, that he maintain full-time employment, that he collect fifty pounds of newspaper each week, and that he enroll in a State licensed alcohol and drug abuse prevention program within ten days (R 36). The trial court justified this downward departure from the guidelines sentence of three and a half to four and a half years incarceration (R 37) in a written order, on the grounds that Petitioner suffered from substance abuse addictions, had no prior arrest history, had two young children, was not under control of his faculties at the time of the offense due to his alcohol abuse, was amenable for rehabilitation, and that the arrest for purchase of cocaine occurred at 7:10 p.m. under circumstances indicating that Petitioner did not fully realize he was in the vicinity of a school (R 29-31). The mandatory minimum three year sentence

otherwise applicable to violations of Section 893.13(1)(e) was not imposed, based on the application of Section 397.12, Fla. Stat. (1989) (R 36):

> This Court feels strongly that F.S. 397.12, provides a meaningful alternative to prison in this particular case.... Oddly enough, it is a legal reality that Defendant would actually serve three (3) years behind prison bars while traffickers in cocaine do less time on a three (3) year minimum mandatory case (approximately ten months).
>
> (7) This Court's decision to depart will give the Defendant an opportunity to become a meaningful and productive member of society -- drug free. F.S. 397.121 (Wests 1989)....

(R 31-32).

On appeal, the Fourth District Court of Appeal reversed the trial court's downward departure sentence, holding that Section 397.12, Fla. Stat. (1989) did not operate to avoid the imposition of the mandatory minimum applicable upon violation of section 893.13(1)(e).

This Court accepted jurisdiction of this case in an order dated February 12, 1992.

SUMMARY OF THE ARGUMENT

The trial court was within the authority granted to it by the legislature when it employed Section 397.012, Fla. Stat. (1989) to implement its decision not to impose the three year mandatory minimum sentence otherwise applicable to Petitioner's conviction for purchasing cocaine within 1000 feet of a school.

ARGUMENT

POINT

THE TRIAL COURT PROPERLY USED SECTION 397.012, FLA. STAT. (1989) TO AUTHORIZE ITS AVOIDANCE OF THE THREE YEAR MANDATORY SENTENCE OTHERWISE APPLICABLE TO PETITIONER'S CONVICTION FOR VIOLATION OF SECTION 893.13(1)(e), FLA. STAT. (1989).

Section 397.011(2), Fla. Stat. (1989) provides:

> 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. 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 licensed by the Department of Health and Rehabilitative Services, pursuant to the provisions of this Chapter, provided the director of such program approves the placement of the Defendant in such program. Such required participation may be imposed in addition to or in lieu of any penalty or probation, and program participation may not exceed the maximum length of sentence possible for the offense.

(Emphasis added.) In addition, Section 397.10, Fla. Stat. (1989) continues with the following expression of 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, violation of laws relating to drug abuse or 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.

Thus, it is the policy of this State, as expressed in the above-cited statutes, that persons found to be in violation of Chapter 893, Fla. Stat. (1989) should not be imprisoned, but, in the trial court's discretion, should be alternatively sentenced to a program of rehabilitation which fits the offender's needs. This intent is implemented by way of Section 397.12, Fla. Stat. (1989), which provides:

> 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, Department of Health and Rehabilitative Services, Department of Corrections, or Parole Commission, whichever has jurisdiction over that person, may in its discretion, require that the person charged or convicted top participate in a drug treatment program licensed by the department under the provisions of this Chapter. 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. If the accused desires final adjudication, his Constitutional right to trial shall not be denied. The Caurt may consult with, or seek the assistance of any agency, public or private, or any person concerning such a referral. Assignment to a drug program may be contingent upon budgetary considerations and availability of space.

(Emphasis added.) In its 1988 session, the legislature left Chapter 397.12 as a viable alternative to sentencing of drug abusers under Chapter 893. Chapter 88-122, Laws of Florida.

In the present case, the trial court exercised the discretion granted to it by this legislative scheme. Petitioner pled guilty to the offense of purchasing cocaine within 1000 feet of a school,

a first degree felony punishable by up to thirty years imprisonment, a minimum mandatory sentence of three calendar years, and an automatic presumptive sentence, even for a first offender like Petitioner, of three and a half to four and a half years incarceration (R 37). At his sentencing hearing, Petitioner presented compelling evidence of his addiction to crack cocaine, to which he devoted almost his entire bi-weekly paycheck of $300 (R 10). In addition, at the time of the drug purchase in question, Petitioner was under the influence of alcohol (R 12, 14). Petitioner, who had never been arrested before, was eager for rehabilitation so that he could return to supporting his wife and two young children (R 23-24).

Consequently, Petitioner was an excellent candidate for the application of Chapter 397, as the trial court found (R 15). In order to implement the legislatively approved rehabilitative goals of the statute, the trial court therefore adjudged him guilty of purchasing cocaine within 1000 feet of a school and placed him on probation for a period of five years, with special conditions that he not use any drugs, that he maintain full-time employment, that he perform eight hours a month community service, that he collect fifty pounds of newspapers each week, and that he successfully complete a drug rehabilitation program pursuant to Section 397.12, Fla. Stat. (R 35-36).

This disposition was justified in a lengthy order by the trial court (R 29-32). In support of the downward departure from the sentencing guidelines, the trial court found that Appellant was under the influence of alcohol at the time that he committed the

crime, that his judgment was impaired thereby, and that he would not have purchased the drugs but for his addiction to crack cocaine (R 30). These were valid reasons for a disposition outside the sentencing guidelines. Barbera v. State, 505 So.2d 413 (Fla. 1987). The trial court further found that Petitioner was not a threat to society and that he sincerely desired rehabilitation and treatment for his substance abuse (R 30). This, too, has been held a sufficient basis for departure. State v. Sachs, 526 So.2d 48 (Fla. 1988).

The State relies for its challenge to the disposition in the instant case on State v. Ross, 447 So.2d 1380 (Fla. 4th DCA 1984), holding that Section 397.12 does not provide an exception to legislativelymandatedminimum sentences. That case, however, deals with a robbery prosecution, not one for violation of the drug abuse laws contained in Chapter 893. The latter, but not the former, are expressly mentioned in the statement of legislative intent contained in Section 397.011(2). The latter, but not the former, are specifically named in Section 397.12 itself: "a violation of any provision of Chapter 893." Thus, Ross is not applicable to the present case, which falls directly within the operation of Chapter 397 by its express terms. But see, State v. Edwards, 456 So.2d 575 (Fla. 2d DCA 1984).

Ross is further distinguished from the instant case by operation of Section 948.01(13), Fla. Stat. (1991), which provides:

> If it appears to the court upon a hearing that the defendant is a chronic substance abuser whose criminal conduct is a violation of chapter 893, the court may either adjudge the defendant guilty or stay and withhold the adjudication of guilt; and, in either case, it

> may stay and withhold the imposition of sentence and place the defendant on drug offender probation.

The authorization provided by this statute is limited solely to violations of Chapter **893** and could, therefore, not assist the defendant in Ross. It is, by its own terms, however, applicable to all drug offenders, no matter what subsection of chapter 893 defines their offense.

Section 948.01(13) is entirely consistent with the legal effect of the omission from the mandatory minimum prison terms defined in Section 893.13(1)e), Fla. Stat. **(1989),** of the prohibition, found in Sections **893.135** [drug trafficking], 784.08(3) [crimes committed against the elderly], 775.087 [crimes committed with firearm], and 775.0823 [violent crimes against law enforcement officers], Fla. Stat. (1989), that the mandatary minimum sentence "shall not be suspended, deferred or withheld." In contrast with each of these statutes, Section 893.13(1)(e) is conspicuous by the fact that these words precluding the trial judge from staying, suspending, or withholding the mandatory sentence are absent.

The restrictive language contained in the other mandatory minimum statutes cannot be implied against the instant statute which does not utilize it. As stated in St. George Island Ltd. v. Rudd, **547** So.2d **958,** 961 **(Fla.** 1st DCA 1989):

> Where the legislature uses exact words in 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.

Since it must be presumed that the legislative inclusion of the proscription against suspending, deferring or withholding sentence has meaning where it is added to a penal statute, the exclusion of that sentence from a similar penal statute likewise must have meaning, namely, that such suspension, deferral, or withholding of the sentence is **not** precluded. Thus, the trial judge sentencing a defendant for a drug transaction committing within 1000 feet of a school is still empowered to suspend, defer, or withhold the mandatory sentence which must otherwise be imposed.

In the present case, the judgment specifically provides that, "The Court hereby stays and withholds the imposition of sentence as to count(s) I and places the Defendant on probation for a period of 5 years under the supervision of the Department of Corrections..." (R 34, emphasis added). The trial court therefore exercised the discretion permitted to it by Sections 893.13(1)(e) and 948.01(13), withheld the mandatory minimum sentence, and directed that Petitianer serve a term of probation, as a special condition of which he is to complete a drug rehabilitation program, as well as comply with other mandates intended to insure his rehabilitation (R 36). Since this procedure is not prohibited by Section 893.13(1)(e), the trial court committed no error in utilizing it, and its disposition of the instant case should be affirmed.

In reversing Petitioner's sentence, the Fourth District Court of Appeal appears to have misconstrued the legislative will expressed in Chapter 953 and Section 397.12, Fla. Stat. (1989), which expressly provide alternatives to incarceration for substance

abusers like Petitioner. By its holding, the district court appears to have limited the circumstances in which a sentencer can exercise discretion under Chapter 953 and Section **397.12** to those **cases** where merely possessory offense are involved, based on one phrase contained in subsection (2) of Section 397.011(2), Fla. Stat., **see,** State **v.** Lane, 16 F.L.W. **1631** (Fla 4th **DCA** June **15, 1991):**

> 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 licensed by the Department of Health and Rehabilitative Services pursuant to the provisions of this chapter...

(Emphasis added.)

However, this phrase must be considered in the context of the entire subsection (2),[1] which defines the legislature's intent and has no limiting language at all. Likewise, subsection **1** of the same statute places no limitation on persons dependant on drugs controlled by Chapter 893, as is Petitioner.[2] Furthermore, by

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[1] "**(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....''

[2] "(1) It is the purpose of the chapter to encourage the fullest possible exploration of ways by which the true facts concerning drug abuse and dependence may be made known generally and to provide a comprehensive and individualized program for drug dependents in treatment and aftercare 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

focussing on only one portion of the preamble of Chapter 397, the district court must have overlooked the fact that Petitioner was sentenced pursuant to specific provisions, Sections 397.10[3] and 397.12,[4] which do not circumscribe their application merely to possessory offenses.

The district court's limitation of the sentencer's discretion to merely possessory offenses overlooks two principles of statutory construction. First,

> 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 cited therein. Second, where a criminal statute is susceptible of different interpretations, it must be construed in favor of the

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same time safeguarding their individual liberties."

[3] "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 further the intent of the Legislature to encourage trial judges to use their discretion to refer persons charged with, or convicted of, violation of laws relating to drug abuse or 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."

[4] "307.12 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...."

accused. E.g., Lambert v. State, 545 So.2d 838 (Fla. 1989). Application of these principles to the present case would result in affirmance of the trial court's disposition.

Consequently, the trial court did not abuse its discretion by sentencing Petitioner in conformity with the terms of Section 397.12, because the instant offense, a violation of Chapter 893, Fla. Stat. (1989), is one which is included within the range of offenses for which alternative treatment is provided for under that statute. Moreover, the trial court was empowered to suspend, withhold or defer, Petitioner's mandatory sentence and place Petitioner on probation. Petitioner's sentence in conformity with the statutory scheme must therefore be upheld, and the decision of the Fourth District Court of Appeal rejecting his argument should be quashed.

CONCLUSION

Based on the foregoing argument and the authorities cited, Petitioner requests that this Court affirm the trial court below.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to DAWN S. WYNN, Assistant Attorney General, Elisha Newton Dimick Building, Suite 204, 111 Georgia Avenue, West Palm Beach, Florida 33401, by courier this 2ND day of MARCH, 1992.

Of Counsel