047

IN THE SUPREME COURT OF FLORIDA

CASE NO. 78,689

TODD RUSSELL BAUMGARDNER

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

****

RESPONDENT'S ANSWER 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 Criminal 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, 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 Petitioner may be referred to as Mr. Baumgardner.

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

The State of Florida accepts the Statement of the Case and Facts as it appears on **page** two through four of Petitioner's brief on the Merits, to the extent that the facts represent an accurate, non-argumentative synopsis of the proceedings below. Pursuant to Fla.R.App.P. 9.201(c), the State submits the following as points of disagreement between the parties over the rendition of the facts:

1. The trial court's stated reason for departure was that the court found Petitioner "was not by a school for the purpose of this statute for which I am departing from the sentencing guideline in statute 397.12" (R 19).

2. The trial court told Petitioner he would have to *go* through some drug programs (R 14), but never assigned Petitioner to any specific program for a definite amount of time while on probation (R 18-20).

3. Petitioner told the court he understood that he could not "take off" and go back to Colorado while on probation, but was willing to stay here and do whatever it took to settle this matter (R 4-15, 16).

The State reserves the right to bring out additional facts as necessary in its argument.

SUMMARY OF ARGUMENT

The Fourth District Court of Appeal was correct in reversing and remanding Petitioner for resentencing to a term which includes the mandatory minimum term of imprisonment for three calendar years in accordance with Fla. Stat. §893.13(1)(e). Section 397.12 is not an exception to the minimum mandatory three year sentence required for conviction under Florida Statute §893.13(1)(e), and therefore, the trial court erred on imposing a downward departure.

In addition, the Fourth District Court's decision must be upheld because the record lacks competent, substantial evidence to support a finding that a reasonable possibility exists that rehabilitation would be successful if Petitioner's sentence was reduced.

ARGUMENT OF APPEAL

THE TRIAL COURT ERRED IN DEPARTING DOWNWARD FROM THE THREE YEAR MANDATORY MINIMUM SENTENCE AND IN SENTENCING PETITIONER ALTERNATIVELY PURSUANT TO FLORIDA STATUTES SECTION 397.12.

At bar, Petitioner pled guilty to purchasing cocaine within 1,000 feet of a school in violation of section 893.13(1)(e)(1989) (R18,49). Section 893.13(1)(e) provides a mandatory minimum sentence of three calendar years for such a conviction. The trial court relied on Barbera v. State, 505 So. 2d 413 (Fla. 1987) and Florida Statutes section 397.12 to circumvent the language of the statute imposing the three year mandatory sentence (R44-47). Petitioner was therefore sentenced to two years probation for purchasing cocaine within 1,000 feet of a school (R 18-19,49), in clear contravention of section 893.13(1)(e). As such, the trial court erred in imposing a downward departure sentence.

The Fourth District Court of Appeal held that section 397.12 does not provide an exception to the minimum mandatory sentencing requirements 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 mandatory minimum three year sentence. The trial court therein sentenced the defendant to probation and a drug rehabilitation program relying on Florida Statutes section 397.12. In reviewing the defendant's sentence, the court in Ross

held that section 397.12 was not an exception to the mandatory sentencing requirements of the firearm sentencing statute. State v. Ross, 447 So. 2d at 1393.

Likewise at bar, and for the same reasons cited in Ross, section 397.12 is not an exception to the minimum mandatory three year sentence required upon conviction of violating section 893.13(1)(e). As stated in Ross, section 893.13(1)(e)(1) is the later promulgated statute. It took effect as currently written on June 17, 1989. Ch. 89-534, Laws of Florida (1989). Section 397.12 first appeared in similar form in 1973, and took effect on July 1, 1973. Ch. 73-75 Laws of Florida (1973). Therefore, section 893.13(1)(e)(1) should prevail as the last expression of legislative will. State v. Ross, 447 So. 2d at 1382. As stated in Ross, "[t]he 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." Id.

Clearly, Florida Statutes section 893.12(1)(e)(1) is unambiguous. It provides that a defendant "shall be sentenced to a minimum term of imprisonment of 3 calendar years and shall not be eligible for parole or statutory gain time..." The statute's mandate is therefore clear. Minimum mandatory sentences are matters of legislative perogative that are nondiscretionary. Chasatz v. State, 577 So. 2d 1298, 1299 (Fla. 1981). Merely because section 893.13(1)(e) does not state that the trial court shall not suspend, defer or withhold sentencing, does not mean

the trial court has discretion to avoid the minimum mandatory term. The word "shall" is mandatory. Well-settled rules of statutory construction require that the statute's terms be construed according to their plain meaning.

In addition, it is significant that there is no existing indication that the legislature intended section 397.12 to serve as an exception to section 893.13(1)(e)(1), a mandatory term of imprisonment. Ross v. State, 447 So. 2d at 1382-1383. Section 893.15, by its terms, is limited to possession, *See* State v. Edwards, 456 So. 2d 575 (Fla. 2d DCA 1985). The present case involves a purchase within **1,000** feet of **a** school.

Even assuming that there is same inconsistency between sections **397** and **893**, the statutes should be given the effect designed for them unless a contrary intent clearly appears, State v. Gadsden County, *63* Fla. 626, 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 sections 397 and **893.** **The** first rule of statutory construction is that words are to be given their plain meaning. It is equally an axiom of statutory construction that an interpretation of a statute which leads to an unreasonable ok 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. Bently, 496 So. 2d 862, review denied, 504 So. 2d 767 (Fla. 2nd DCA 1986).

Florida Statutes, section 397.12 (1989) refers to those people who have been convicted of a violation of any provision of chapter 893. This statute is general in its terms and refers generally to the law of the subject or to section 893. U.S. v. Rogriguez-Rodriguez, 863 F. 2d 830 (11th 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. Pichard v. Jax Liquors, Inc., 449 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) or (1)(g) by possessing contraband. This is also consistent with the general principle mentioned previously, that 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 mare general terms.

Clearly, section 893.13(1)(e) is unambiguous. The statute states: "shall be sentenced to a minimum term of imprisonment of 3 calendar years and shall not be eligible for parole or statutory gain time...," Fla. Stat. §893.12(1)(e) (1989). The statute's mandate is clear! Using well-known statutory construction principles, one must conclude that section 397 is not an exception to the mandatory requirements of section 893.13(1)(e). Any other interpretation would lead to an absurd or unreasonable result and would render section 893.12(1)(e) purposeless. State v. Webb, 398 So. 2d 820, 824 (Fla. 1981). What would be the purpose having a minimum mandatory sentence if any defendant could declare his "heart felt" desire for rehabilitation and, thus, avoid the minimum mandatory? What defendant would not make such a declaration and what defense counsel would not instruct his client to make such a declaration? The clear legislative intent behind section 893.13(1)(e) is to create a drug free zone around schools. This intent would be rendered meaningless were the minimum mandatory sentence so

easily avoided. Consequently, the plain meaning of the statute should prevail.

Based on the foregoing, Respondent maintains that, pursuant to Ross, supra, and the rules of statutory construction, Florida Statutes section 397.12 is not an exception to the mandatory requirements of section 893.12(1)(e)(1). As such, the sentence imposed in the trial court was an illegal sentence and the Fourth District Court of Appeal was correct in reversing and remanding Petitioner for resentencing to a term which includes the minimum term of three calendar years, in accordance with section 893.13(1)(e)(1).

However, even assuming arquendo that a downward departure in Petitioner's sentencing did not violate the mandatory minimum provision in section 893.13(1)(e), substance abuse, standing alone, will not justify a departure where the record lacks substantial, competent evidence to support a finding that a reasonable possibility exists that rehabilitation will be successful. Herrin v. State, 568 So. 2d 920 (Fla. 1980). This court in Herrin, modified Barbera v. State, 505 *So.* 2d 413 (Fla. 1987) by imposing two prerequisites which must be met before a downward departure sentence can be imposed: (1) a defendant's substance abuse must be considered along with (2) his or her amenability to rehabilitation. Herrin v. State, 568 So. 2d 922.

The State questions the trial court's finding regarding Petitioner's substance abuse. Contrary to the trial court's findings, there is no evidence in the record to support

that Petitioner was in an intoxicated state when he was arrested for purchasing crack within 1000 feet of a school. To the contrary, the trial court asked Petitioner the following question:

> THE COURT: When you bought this, you'd been drinking?
>
> THE DEFENDANT: No, I just gotten off work It's been a long time (R 8).

In fact, the only evidence of Petitioner's alcohol use was when Petitioner told the court that he does not drink a whole lot, "perhaps a couple of beers" on the weekend with his brother-in-law or if they went bowling (R 10). The court, later asked Petitioner if he would mind or if it would affect him if the court told him he could not have alcohol or go to a place where alcohol was served. Petitioner responded, "no". (R 13).

Furthermore, although Petitioner stated that he had always had a problem with cocaine, he admitted he was not addicted to it. Rather, he used to snort cocaine for six years up North on and off because it was expensive and he could not afford it (R 15-16). His only problem was a two month period during which he would spend his paycheck every Friday purchasing crack, prior to his arrest. According to Petitioner, he would get paid on Friday and be broke on Monday (R 6,13). There was no evidence that he used crack during the week, or on an every day basis or had any long history of addiction. However, even if Petitioner is a substance abuser, he cannot meet the second prong of the standard articulated in Herrin. The record is completely

devoid of *any* evidence from which the court could find Petitioner amenable to rehabilitation.

In Herrin, this court looked to the fact that although the Petitioner had a dependency on drugs, he abstained from drugs for a substantial period of time following treatment, which indicated a reasonable possibility of rehabilitation. By contrast, Petitioner had only refrained from drugs for twenty eight (28) days at the time of sentencing. He admitted that right after being released, he broke down and used crack "just once", then quit again (R 10). Appellant has had no meaningful rehabilitation. According to him, since he was arrested he went to see Ed Kallan, from the Chemical Depending Center, two times per week. He spent two, three or five hundred dollars going there, and stopped going when he was laid off (R 9). There was NO evidence to corroborate Petitioner's testimony as to his dependency such as how long or what treatment, if any, he received from seeing Ed Kallan. The State submits that more than the Petitiner's own self-serving statements are necessary before a court can make an adequate finding that a reasonable possibility exists that he will be amendable to rehabilitation. Twenty eight (28) days is also not a substantial period of time following treatment, to support such finding. In short, there is no competent substantial evidence to support a reasonable possibility that if the Petitioner's sentence was reduced in order to permit treatment for his crack dependency, such treatment would be successful. Under these circumstances, to

permit drug dependency to justify a departure in this case, would "thwart the guidelines purpose of providing more uniformity in sentencing". This is especially true since the court did not specify a specific program Petitioner was to enter or the length of time he was to receive treatment while on probation (R 14). Consequently, under Herrin, the trial court erred in departing downward on the basis of substance abuse in this case.

Therefore, in light of the foregoing arguments, this court must affirm the decision of the Fourth District Court reversing petitioner's original sentence, and remanding for resentencing to a term which includes the minimum mandatory term of three calendar years.

POINT II

THE FOURTH DISTRICT COURT'S DECISION MUST BE UPHELD WHERE PETITIONER WAIVED HIS RIGHT TO COUNSEL ON THE STATE'S APPEAL

Petitioner requests this court to vacate the Fourth District Court's decision because Petitioner was indigent and without counsel (PB 18). Respondent vehemently objects to Petitioner raising this argument. This matter was never before the Fourth District Court on direct appeal, is not before this court on a certified question, or in conflict with a decision of another district or Supreme Court decisian. Even if Petitianer gained jurisdiction because the Fourth District Court's decision mentioned State v. Baxter, 16 FLW D1561 (Fla. 4th DCA June 12, 1991), the State objects to Petitioner's "bootstrapping" this issue to the downward departure issue.

Secondly, this issue is before this court based upon Judge Polen's concurring opinion on rehearing. Although Judge Polen's concurring decision discusses a waiver of Petitioner's right to counsel, this was but the opinion of one judge and not the opinion of the Fourth District Court of Appeal. The Fourth District Court merely issued a per curiam decision, denying Petitioner's motion for rehearing on the downward departure issue. Therefore, this court is without jurisdiction to review this case because Petitioner has no basis from which to appeal this issue.

Nevertheless, if this court, within its discretion, addresses this issue, Respondent disagrees with Petitioner'a averments and contends that Petitioner has waived this issue by absconding from this jurisdiction after receiving notice of the State's appeal. The law is well-settled that once Petitioner leaves the jurisdiction in this manner, he looses his right to appeal. Hannah v. State, 406 So. 2d 1212 (Fla. 3rd DCA 1981); Chambers v. State, 391 SO. 2d 353 (Fla. 5th DCA 1980); Jones v. State, 362 So. 2d 149 (Fla. 3rd DCA 1978); Bretti v. Wainwright, 225 So. 2d 516 (Fla. 1969). Thus, any right to appeal was forefeited by Petitioner.

In this case, Judge Polen, not the Fourth District Court, found that after obtaining a favorable ruling Petitioner was indeed advised that the State had appealed. State v. Baumgardner, Case No. 90-3337 (Fla. 4th DCA September 4, 1991) (on motion for rehearing) (Polen, J., concurring and dissenting in part). The Petitioner responded to the State's notice of appeal by absconding from the jurisdiction. Therefore, as Judge Polen points out, Petitioner has waived any right to appeal. Any argument or documents Petitioner uses in this issue is: (1) part of the direct appeal, (2) not a part of the opinion of the Fourth District Court and (3) not a part af the record on appeal. Thus, this court still lacks jurisdiction on this issue and this issue should be stricken.

Furthermore, the remedy sought by Petitioner is useless because even if this court remands to the Fourth District

Court, the holding in Baxter is controlling and there is no showing that Petitioner would have faired any differently had he been represented by counsel. In any event, the Fourth District Court has already granted Petitioner's motion to stay mandate pending this Court's resolution in State v. Baxter, Supreme Court Case No. 78,294 and State v. Scates, Supreme Court Case No. 78,533. Therefore disposition by this courut of issue 1 makes this issue moot,

CONCLUSION

WHEREFORE based upon the foregoing reasons and authorities, Respondent respectfully requests that the decision of the lower court be **AFFIRMED,**

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that **a** true copy of the foregoing Respondent's Brief on the Merit has been furnished to: Margaret Good, Assistant Public **Defender,** 15th Judicial Circuit, **301** North Olive **Avenue,** West Palm Beach, FLorida 33401, this 31st day of March, **1992,**

Michelle A. Smith
Of Counsel