W00A 047

IN THE SUPREME COURT OF FLORIDA

CASE NO. 78,835

LEIF NORDBERG,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

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RESPONDENT'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Respondent was the Appellant 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 Petitioner may be referred to as Mr. Nordberg,

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. Petitioner, Leif Nordberg conceded that he knew cocaine was illegal in America (R 31) and that it was illegal to purchase cocaine (R 32-33), although he did not realize the charges were "so serious". (R 40)

2. Petitioner had **never** used cocaine in Sweden and never had a cocaine problem (R 30).

3. There was no evidence presented that Petitioner suffers from schizophrenia or paranoia. To the contrary, Petitioner told the trial court that he "was diagnosed as having every kind of mental illness when in effect of drugs" (R 25). Petitioner conceded that his schizaphrenia or paranoia was separate from his normal condition, and only occurs when he is under the influence of drugs or alcohol, (R 26)

4. There is no indication from the record that Petitioner used drugs continuously from 1967. Defense counsel **asked** Petitioner:

Q. Since 1967 to now, which is 24 --- Is that right 24 years? Have you been using drugs this entire period?

A. Three

Q. Excuse me?

A. Some, I had some clean periods, yes.

Q. You had some clean periods, but the majority of the 24 years you've been using alcohol or drugs?

A. Hash (R 28-29)

5. On the day of Petitioner's arrest, he drank a pint of Southern Comfort (R 30) which he shared with his girlfriend, although she had her own bottle (R 32)

6. The trial court expressed concern in hearing what the appellate courts had to say on this issue (R 13). The trial court agreed that had Petitioner been arrested for selling cocaine within 1000 feet of a school, it was confident the legislature did not intend for the court to apply section 397.12. (R 15)

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

SUMMARY OF ARGUMENT

The Fourth District Court of Appeal was correct in reversing and remanding Petitioner for sesentencing to a term which includes the mandatory minimum term of imprisonment for three calendar years in accordance with Fla. Stat. §893.13(1)(e). The Fourth District Court's decision must also be upheld where 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 ON 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)(R 43-44). 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 (R 28-32). Petitioner was therefore sentenced to three years probation for purchasing cocaine within 1,000 feet of a school (R 44), in clear contravention of §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 reversing 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 statutes. 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 called for 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. 89-524, 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 late 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.** Charatz v. State, 577 So.2d 1298, 1299 (Fla. 1991) 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.

Ironically, the trial court agreed that the legislature did not intend for section 397.12 to be applied to Petitioner, had he been arrested for selling cocaine. (R 15) However, the court applied the alternative sentence even though Petitioner was purchasing the cocaine.

Even assuming that there is some 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. 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 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 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 mare comprehensive statute. Floyd v. Bentley, 496 So.2d 862, review denied, 504 So.2d 767 (Fla. 2d 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 in general to the law of the subject or generally to section 893. U.S. v. Rodriquez-Rodriquez, 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. Prichard v. Jax Liquors, Inc., 499 So.2d 926, review denied, 511 So.2d 298 (Fla. 1st DCA 1906). 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 more 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 principals, 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 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 Court District Court of Appeal 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 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, together with (2) his or her amenability to rehabilitation. Herrin v. State, 568 So.2d at 922. Therefore, 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 amendable 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 in the instant case, has consistently used amphetamines and hashish during his twenty four year history. He had only "some clean periods" despite nine months of drug counselling and treatment in 1981 (R 25, 28).

Moreover, it is worth noting that Petitioner has not only never had a cocaine problem, he has never even used cocaine (R 30-31). In short, there is no competent substantial evidence to suggest a reasonable possibility that if the Petitioner's sentence was reduced in order to permit treatment for his hashish and amphetamine dependency, such treatment would be successful. Under these circumstances, to permit drug depency to justify a departure in this case, would "thwart the guidelines purpose of providing more uniformity in sentencing". 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.

CONCLUSION

Wherefore, based upon the foregoing arguments and authorities cited herein, Respondent respectfully requests that the Fourth District Court's reversal of Petitioner's original sentence, be AFFIRMED.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Answer Brief has been furnished by Courier to: **ELLEN MORRIS**, Assistant Public Defender, Fifteenth Judicial Circuit of Florida, The Governmental Center, 301 N. Olive Avenue/9th Floor, West Palm Beach, Florida 33401, on this 15 day of March, **1992.**

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