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CLERK, SUPREME COURT
By _____
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IN THE SUPREME COURT OF FLORIDA

ANNETTE JENKINS,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

Case No. 78,916

PETITIONER'S BRIEF ON THE MERITS

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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 Annette Jenkins was arrested on April 12, 1990 for the purchase of cocaine within a 1000 feet of a school after participating in a police reverse sting operation that was purposely set up within a 1000 feet of a school (R 6-7). Petitioner was subsequently charged by Information on May 16, 1990 filed in the 17th Judicial Circuit with purchase of cocaine within a 1000 feet of a school (R 24-25). See Sections 893.03(2)(a)(4) and 893.13(1)(e), Florida Statutes (1989). On September 19, 1990, Petitioner withdrew her initial plea of not guilty and entered a plea of guilty to the said charge (R 4).

At the change of plea hearing, Petitioner testified that the cocaine she purchased was for her own use (R 10). She previously used it for four years and smoked marijuana with it two to three times a week (R9). Petitioner did not realize she was within 1000 feet of a school but knew where the school was located (R 8,12). At the time of the Petitioner's arrest, she was addicted to crack cocaine (R 9). Petitioner also testified that if given a chance to complete a rehabilitation program, she would do so (R 11).

After explaining the terms and consequences of the change of plea, the trial judge accepted the change of plea (R 5). A motion for downward departure pursuant to Florida Statute Section 397.12 was filed by Petitioner's counsel (R27-31). The trial judge found that Petitioner was a drug addict at the time of the offense and stated that he would sentence the Petitioner pursuant Florida Statute Section 397.12 (R 21, 32-35). The prosecutor argued that the trial judge did not have the discretion to go below the three (3) year mandatory minimum sentence (R 17). She was placed on 18

months probation and referred to the Health Rehablitation Services (HRS) to a drug rehabilitation program for evaluation and treatment pursuant to Florida Statute Section 397.12 (R 20).

The trial judge in the contemporaneous written downward departure order filed in this case sentenced Petitioner alternatively, pursuant to Section 397.12, F.S. (1989), as follows:

> 6. The Court further finds it is the policy of this State "to provide meaningful alternatives to criminal imprisonment for individual capable of rehabilitation as useful citizens through techniques and programs" not available in the prison system. Florida Statutes 397.10 (Wests 1989). The legislature encourages trial judges to use their discretion in sentencing persons charged with a violation of Chapter 893 where there is evidence that the person charged is a drug abuser and is capable and desires rehabilitation. See State v. Edwards, 456 So.2d 575 (Fla. 2d DCA 1984) and Florida Statute 397.12 (Wests 1989). The evidence in this case indicates that the Defendant purchased one (1) "rock" of cocaine which was for personal use and not intended for resale or distribution. It has been shown that he Defendant is amenable an capable of meaningful rehabilitation back to society.
>
> 7. This Court feels strongly that Florida Statute 397.12 provides a meaningful alternative to prison in this particular case. The Defendant is a second time offender who scores three and one half (3 1/2) to four and one half (4 1/2) years under the guidelines with a minimum period of incarceration of three (3) calendar years with no gaintime. Oddly enough, it is a legal reality that the 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 (10) months).

(R 33-34)

During the course of Petitioner's appeal, an Affidavit of Violation of Probation was filed on December 20, 1990 violating her probation. On May 7, 1991 petitioner's probation was revoked and sentence to a three (3) years minimum mandatory term in the Departmennt of Correction.

On direct appeal by Respondent, the Fourth District Court of

Appeal reversed Petitioner's sentence. State v. Jenkins, 16 F.L.W. D2628 (Fla. 4th DCA October 9, 1991). In ruling that the three (3) year mandatory minimum sentence under Section 893.13(1)(e) controlled, the District Court relied on State v. Scates, 585 So.2d 385 (Fla. 4th DCA 1991), and also the Fourth District Court of Appeal's decision in State v. Baxter, 581 So.2d 937 (Fla. 4th DCA 1991), and certified the identical issue as a question of great public importance to this Court as in State v. Scates, supra, (Appendix 2). 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).

The Fourth District in a written order (October 9, 1991) also certified the same question in Scates v. State, supra as it did in the instant case. Counsel in Scates filed a notice of intent to invoke discretionary jurisdiction of this Court and Scates is currently pending before this Honorable Court (Case No. 78,533). Petitioner thereupon noticed her intent to invoke this Court's discretionary jurisdiction to review this cause on November 4, 1991.

On November 18, 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

Petitioner, Annette Jenkins's sentence of 18 years probation with drug therapy (R 32-35) should be affirmed. The trial court had full authority and was within its discretionary powers to so sentence Petitioner. Ms. Jenkins meets the criteria for application of Section 397.12, Fla. Stat. Specifically, she 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 in the statute, Section 893.13(1)(e) stating that the mandatory minimum sentence "shall not be suspended, deferred or withheld," nor is there any language 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 Ms. Jenkins would be cruel and unusual punishment wholly disproportionate to the offense for which Ms. Jenkins was convicted.

ARGUMENT

THE TRIAL COURT DID NOT ERR IN DEPARTING DOWNWARD FROM THE THREE YEAR MANDATORY MINIMUM SENTENCE OR IN SENTENCING PETITIONER ANNETTE JENKINS PURSUANT TO SECTION 397.12, FLORIDA STATUTES.[1]

At sentencing, the trial judge found that Petitioner was a drug dependent amenable to rehabilitation pursuant to Section 397.12, Fla. Stat. (1989). Following his guilty plea to purchasing cocaine within one thousand feet of a school, Petitioner was placed on 18 months of probation with drug therapy (R 20). The trial judge did not impose the 3 year mandatory minimum sentence specified in Section 893.13(1)(e), Fla. Stat. (1989). The trial judge did not abuse his discretion for failing to do so for a number of reasons.

First, statutory analysis of 893.13(1)(e), Fla. Stat. (1989) demonstrates that imposition of the three (3) year mandatory minimum is not absolute. Second, Petitioner meets the statutory criteria under Section 397.12 as a drug dependent. The most recent expression of legislative will, via Chapter 953, shows the efficacy of Petitioner's probation. Third, recent cases have upheld downward departure from the sentencing guidelines where the defendant was, like Petitioner, impaired by substance abuse at the time of the crime and, like Petitioner, amenable to rehabilitation. Finally, the application of the three year mandatory minimum sentence in Ms. Jenkins's case would be disproportionate to the offense for which she has been convicted. These points will be

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[1] The argument in this brief is essentially the same as the argument asserted in Forrest v. State, Case No. 78,955 which is currently pending before this Supreme Court.

addressed sequentially.

This case involves the interplay of Section 397.12, which provides alternatives to incarceration for substance abusers like Petitioner, 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 minimum sentences shows that the three (3) year mandatory minimum for selling, purchasing, etc., cocaine within 1,000 feet of a school is not as 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 mandatory sentence.

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 by the Legislature 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 (3) year mandatory minimum sentence. 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."[2]

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

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 states that the mandatory 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

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

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.

There is an additional basis upon which the original sentence herein must be upheld. Petitioner disputes the view of the Fourth District that Section 397.011(2), Fla. Stat. (1989) applies only to simple possession and not to purchase. See State v. Lane, 582 So.2d 77 (Fla. 4th DCA 1991), rev. pending, Case No. 78, 534. 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 State v. Lane, supra, 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. Common sense also dictates this result. 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 Petitioner's imposition of probation must be affirmed.

The trial court in its sentence order noted that the Legislature "encourages trial judges to use their discretion in sentencing persons charged with a violation of Chapter 893 where there is evidence that the person charged is a drug abuser and is capable and desires rehabilitation." R 33. The trial judge further found, at bar, that Petitioner "purchased one (1) "rock" of cocaine which was for personal use and not intended for resale or distribution. It has been shown that she Defendant [Petitioner] is amenable and capable of meaningful rehabilitation back to society." R 34.

Thus Petitioner established in the lower court that she was a substance abuser and was also under the influence at the time of her offense. She therefore was eligible for a downward departure

from the guidelines under State v. Herrin, 568 So.2d 920 (Fla. 1990) and Barbera v. State, 505 So.2d 413 (Fla. 1987). This Court should affirm the trial court's sentence on this alternative basis supra.

In State v. Herrin, supra, this Honorable Court stated that substance abuse, coupled with amenability to rehabilitation, could be considered by the trial court in mitigation of a guideline sentence. Under the criteria set forth in these cases, Petitioner established his amenability to rehabilitation and this was the finding made by the trial court.

Finally, Petitioner contends that imposition of the three (3) year mandatory minimum sentence, would if imposed on remand 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 Petitioner, an offender with no prior offense. 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 Petitioner'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.

This Honorable Court should sanction the use of Section 397.12, F.S. in the instant case to justify the sentence impose

upon Petitioner. Drug addiction is a disease. It should be treated as such. This futile and costly "jail madness" in response to our society's serious drug problems frankly needs to be reexamined.

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 reverse the decision of the Fourth District Court of Appeal and affirm the sentence of the trial judge.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished by courier to Carol Asbury, Assistant Attorney General, Elisha Newton Dimick Building, Room 240, 111 Georgia Avenue, West Palm Beach, Florida 33401 this 17th day of December, 1991.

Counsel for Petitioner

IN THE SUPREME COURT OF FLORIDA

ANNETTE JENKINS, Petitioner, vs. STATE OF FLORIDA, Respondent.	)	CASE NO. 78,916

A P P E N D I X

TO

PETITIONER'S INITIAL BRIEF ON THE MERITS

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT JULY TERM 1991

STATE OF FLORIDA,

Appellant,

v.

ANNETTE JENKINS,

Appellee.

CASE NO. 90-2705.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DISPOSED OF.

Opinion filed October 9, 1991

Appeal from the Circuit Court for Broward County; Robert W. Tyson, Jr., Judge.

Robert A. Butterworth, Attorney General, Tallahassee, and Carol Cobourn Asbury, Assistant Attorney General, West Palm Beach, for appellant.

Richard L. Jorandby, Public Defender, and Mallorye Cunningham, Assistant Public Defender, West Palm Beach, for appellee.

PER CURIAM.

Appellee was charged by information with purchasing cocaine within 1,000 feet of a school in violation of sections 893.13(1)(e) and 893.03(2)(a)4, Florida Statutes (1989). She pled and moved the court to depart downward from the presumptive guidelines sentence, to avoid the three year minimum mandatory sentence, and to sentence her pursuant to section 397.12, Florida Statutes. The trial court withheld adjudication and placed her on probation for eighteen months. It entered a well-considered, four page order of departure in which it detailed reasons for

sentencing her pursuant to section 397.12 and ordering her referred to a drug treatment program licensed through HRS. The state appealed the order as an illegal sentence.

We reverse. In State v. Baxter, 581 So.2d 937 (Fla. 4th DCA 1991), this court determined that a trial court cannot downward depart from a mandatory sentence even with valid reasons for departure. The court further noted that section 397.12, Florida Statutes (1989), relates only to defendants who have been convicted of possessing illegal drugs. See also State v. Lane, 582 So.2d 77 (Fla. 4th DCA 1991); State v. Baumgardner 16 F.L.W. 1734 (Fla. 4th DCA July 3, 1991); State v. Liataud, 16 F.L.W. 2245 (Fla. 4th DCA July 17, 1991).

However, the court certified the following question to the supreme court in State v. Scates, No. 90-3174 (Fla. 4th DCA Aug. 21, 1991):

> 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)?

We also certify the same question here.

GLICKSTEIN, C.J., ANSTEAD and HERSEY, JJ., concur.

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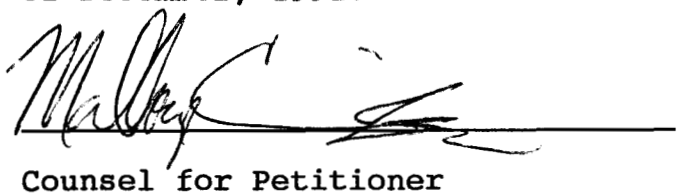
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished by courier to Carol Asbury, Assistant Attorney General, Elisha Newton Dimick Building, Room 240, 111 Georgia Avenue, West Palm Beach, Florida 33401, this 12th day of December, 1991.



Counsel for Petitioner