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CLERK, SUPREME COURT
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IN THE SUPREME COURT OF FLORIDA

CHARLIE FORREST,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

Case No. 78,955

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 Charlie Forrest was charged by Information filed in the 17th Judicial Circuit with purchase of cocaine within a 1000 feet of a school (R 19, 23). See Sections 893.03(2)(a)(4) and 893.13(1)(e), Florida Statutes (1989). On December 11, 1990, Petitioner withdrew his initial plea of not guilty and entered a plea of guilty to the charge (R 6, 23).

At the change of plea hearing, Petitioner testified that the cocaine he purchased was for his own use (R 8). He used it everyday with some alcohol (R 8). Petitioner did not realize he was within 1000 feet of a school but he knew he was near the school (R 9-10). Petitioner had consumed about a six pack of beer over a 3 1/2 hour period prior to his arrest (R 14). Petitioner also testified that he had been in a rehabilitation program while in jail (R 11).

After explaining the terms and consequences of the change of plea, the trial judge accepted the change of plea. The trial judge found that Petitioner was an alcoholic at the time of the offense and stated that he was going to depart from the sentencing guidelines (R 15). The prosecutor argued that the trial judge did not have the discretion to go below the three (3) year mandatory minimum sentence (R 15). He was placed on two year probation.

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 22.

In imposing the two year probation, the trial judge ordered that Appellee be "referred to a licensed Department of Health and Rehabilitation Services Drug Treatment Program pursuant to Florida Statute Section 397.12 (Wests 1989). The Defendant shall be placed on probation to supervise his compliance with his treatment plan." R 22.

On direct appeal by Respondent, the Fourth District Court of Appeal reversed Petitioner's sentence. State v. Forrest, 16 F.L.W. D2807 (Fla. 4th DCA Nov. 6, 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 (Nov. 6. 1991) also ruled that "the issue is certified as one of great public importance as set out in Scates v. State, Case No. 90-3174 (Fla. 4th DCA August 21, 1991). Appendix 3. 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 his intent to invoke this Court's discretionary jurisdiction to review this cause on November 8, 1991.

On November 25, 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, Charlie Forrest's sentence of two (2) years probation with drug therapy (R 16) should be affirmed. The trial court had full authority and was within its discretionary powers to so sentence Petitioner. Mr. Forrest meets the criteria for application of Section 397.12, Fla. Stat. Specifically, he 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 Mr. Forrest would be cruel and unusual punishment wholly disproportionate to the offense for which Mr. Forrest was convicted. It should be noted if Petitioner violates his probation then the trial court at that time would have full authority to impose the three (3) mandatory minimum sentence upon Petitioner.

ARGUMENT

THE TRIAL COURT DID NOT ERR IN DEPARTING DOWNWARD FROM THE THREE YEAR MANDATORY MINIMUM SENTENCE OR IN SENTENCING PETITIONER CHARLIE FORREST PURSUANT TO SECTION 397.12, FLORIDA STATUTES.

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 two (2) years of probation with drug therapy (R 16). 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 Mr. Forrest's case would be disproportionate to the offense for which he has been convicted. These points will be 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."[1]

It is clear that the Legislature intended to impose a minimum

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

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 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 22. 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 he Defendant [Petitioner] is amenable and capable of meaningful rehabilitation back to society." R 22.

Thus Petitioner established in the lower court that he was a substance abuser and was also under the influence at the time of his offense. He 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 ($3\frac{1}{2}$) to four and one-half ($4\frac{1}{2}$) years in state prison for Petitioner, an offender with one 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). The trial court agreed that Petitioner would be allowed to withdraw his plea if his reduced sentence was reversed on appeal. (R 5).

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 James J. Carney, Assistant Attorney General, Elisha Newton Dimick Building, Room 240, 111 Georgia Avenue, West Palm Beach, Florida 33401 this 23 day of December, 1991.

Counsel for Petitioner

A P P E N D I C E S

A P P E N D I X 1

DCA 1986), we think that personal jurisdiction over the wife can be obtained on the basis of her ownership of property in this state.

The case is reversed and remanded with instructions to reinstate the husband's complaint for partition and, upon proper motion, to allow the husband to amend his petition for dissolution if he so desires. (DOWNEY AND ANSTEAD, JJ., concur.)

* * *

Criminal law—Search and seizure

STATE OF FLORIDA, Appellant, v. MICHAEL PRATT, Appellee. 4th District. Case No. 90-1277. Opinion filed November 6, 1991. Appeal of a nonfinal order from the Circuit Court for Broward County; Patti Englander Henning, Judge. Robert A. Butterworth, Attorney General, Tallahassee, and James J. Carney, Assistant Attorney General, West Palm Beach, for appellant. Richard L. Jorandby, Public Defender, and Jeffrey L. Anderson, Assistant Public Defender, West Palm Beach, for appellee.

(PER CURIAM.) We grant the motion for rehearing and vacate our order of December 24, 1990.

The state appeals from an order granting a motion to suppress physical evidence. The trial court based its determination, at least in part, on the Florida Supreme Court's decision in *Bostick v. State*, 554 So.2d 1153 (Fla. 1989). That decision has been reversed by the United States Supreme Court in *Florida v. Bostick*, U.S. _, 111 S.Ct. 2382, 115 L.Ed.2d 389, (1991). Accordingly, we reverse and remand to permit the trial court to make express findings of fact after applying the test mandated by *Florida v. Bostick*.

REVERSED AND REMANDED. (ANSTEAD, HERSEY and WARNER, JJ., concur.)

* * *

Criminal law—Jurors—Peremptory challenges—Record supported trial court's finding that state's explanation that it challenged two black prospective jurors because they were teachers and it intended to excuse all teachers was not pretextual

DONNELL SLATER, Appellant, v. STATE OF FLORIDA, Appellee. 4th District. Case No. 90-3338. Opinion filed November 6, 1991. Appeal from the Circuit Court for St. Lucie County; Marc Cianca, Judge. Richard L. Jorandby, Public Defender, and Joseph R. Chloupek, Assistant Public Defender, West Palm Beach, for appellant. Robert A. Butterworth, Attorney General, Tallahassee, and Melynda L. Melear, Assistant Attorney General, West Palm Beach, for appellee.

(STONE, J.) Appellant's conviction for first degree murder is affirmed. Upon a review of the record, we find no error or abuse of discretion in the trial court's decision, which overruled appellant's objection to the state's peremptory challenges to two prospective African American jurors, both teachers. The state explained that it was excusing all teachers.

At first glance, the state's explanation appears to fail the tests set out in *State v. Slappy*, 522 So.2d 18 (Fla.), *cert. denied*, 487 U.S. 1219, 108 S.Ct. 2873, 101 L.Ed.2d 909 (1988) and *Gadson v. State*, 561 So.2d 1316 (Fla. 4th DCA 1990). However, in this case, two other African American jurors were accepted by the state. Also, two teachers who were not members of a minority were stricken by the state. Additionally, the state announced its intention to also strike the two teachers remaining in the jury pool. We further note that the deceased victim was of the same minority race as the appellant. These additional facts are indicia of an absence of pretext not found in *Slappy*.

The trial court found that the challenges were not racially motivated. This finding is entitled to deference by this court. *Reynolds v. State*, 576 So.2d 1300 (Fla. 1991); *Reed v. State*, 560 So.2d 203 (Fla.), *cert. denied*, _U.S._, 111 S.Ct. 230, 112 L.Ed.2d 184 (1990).

We also find no error in the other issue raised.

AFFIRMED. (ANSTEAD and GUNTHER, JJ., concur.)

* * *

Unemployment compensation—Substantial competent evidence supported appeals referee's conclusion that employee was terminated when employer failed to include him on the regular employee shift assignments rather than at later date when he failed to show up at a meeting with the employer to discuss the situation—Unemployment Appeals Commission may not reweigh evidence or reverse referee when decision is based on substantial competent evidence

CHRISTOPHER E. SMITH, Appellant, v. FLORIDA UNEMPLOYMENT APPEALS COMMISSION and DGP INVESTMENTS, INC., Appellees. 4th District. Case No. 90-3131. Opinion filed November 6, 1991. Appeal from the Florida Unemployment Appeals Commission. Christopher E. Smith, Dallas, Texas, pro se appellant. John D. Maher, Tallahassee, for appellee-Florida Unemployment Appeals Commission.

(PER CURIAM.) We reverse the order of the Unemployment Appeals Commission because the Commission erred in reversing the finding of the appeals referee. While the appeals referee determined that appellee had been terminated when the employer failed to include him on the regular employee shift assignments, the Board found that he had not been terminated then but was terminated later for cause when he failed to show up at a meeting with the employer to discuss the situation. There was substantial competent evidence to support the referee's conclusion that appellant was terminated at the earlier date. The U.A.C. cannot reweigh the evidence or reverse the referee when her decision is based on substantial competent evidence. *See Forkey & Kirsch, P.A. v. Unemployment Appeals Comm'n*, 407 So.2d 319 (Fla. 4th DCA 1981) and *Citrus Central v. Detwiler*, 368 So.2d 81 (Fla. 4th DCA 1979).

We therefore reverse and remand with instructions to reinstate the appeals referee's decision. (DOWNEY, LETTS and WARNER, JJ., concur.)

* * *

Criminal law—Sentencing—Error to refuse to apply statutory sentencing provisions mandating suspension of driving privileges upon conviction of possession of marijuana, among other offenses—Defendant to be given opportunity to withdraw plea agreement on remand

STATE OF FLORIDA, Appellant, v. LESLIE LAWTON, a/k/a LINZIE LAWTON, Appellee. 4th District. Case No. 91-0469. Opinion filed November 6, 1991. Appeal from the Circuit Court for Broward County; Richard D. Eade, Judge. Robert A. Butterworth, Attorney General, Tallahassee, and Melvina Racey Flaherty, Assistant Attorney General, West Palm Beach, for appellant. No appearance for appellee.

(PER CURIAM.) We reverse that portion of the trial court's sentencing order refusing to apply the provisions of section 322.055(1), Florida Statutes (1991). That section mandates suspension of an offender's driving privileges upon conviction of, among other offenses, possession of marijuana.

The trial court, apparently because of a ruling in an earlier case before it, ruled that the statute was "unconstitutional", and refused to apply it here. Appellee has filed no brief and the record reflects no discussion of, or basis for, the court's ruling. The state relies on general constitutional law principles favoring approval of legislative enactments such as section 322.055(1), as well as other states' support of such enactments. *See, e.g., State v. Yu*, 400 So.2d 762 (Fla. 1981), *appeal dismissed, Wall v. Florida*, 454 U.S. 1134, 102 S.Ct. 988, 71 L.Ed.2d 286 (1982); *State v. Smith*, 276 A.2d 369 (N.J. 1971).

We reverse and remand with directions that the appellee be given an opportunity to withdraw from the plea agreement giving rise to the sentence involved herein. If the plea agreement and sentence stand, the sentence should be in accord with the provisions of section 322.055(1). (DOWNEY, ANSTEAD and POLEN, JJ., concur.)

* * *

Criminal law—Purchase of cocaine within 1000 feet of school—Sentencing—Question certified whether a trial court may 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)

STATE OF FLORIDA, Appellant, v. CHARLIE FORREST, Appellee. 4th

District. Case No. 91-0018. Opinion filed November 6, 1991. Appeal from the Circuit Court for Broward County; Robert W. Tyson, Jr., Judge. Robert A. Butterworth, Attorney General, Tallahassee, and James J. Carney, Assistant Attorney General, West Palm Beach, for appellant. Richard L. Jorandby, Public Defender, and Anthony Calvello, Assistant Public Defender, West Palm Beach, for appellee.

(PER CURIAM.) Reversed and remanded for further proceedings in accord with this court's opinion in *State v. Baxter*, 581 So.2d 937 (Fla. 4th DCA 1991). We also certify the issue as one of great public importance as we did in *Scates v. State*, 585 So.2d 385 (Fla. 4th DCA 1991). We do not restate the issue since it is set out in full in *Scates*. (GLICKSTEIN, C.J., ANSTEAD, J., and OFTEDAL, RICHARD L., Associate Judge, concur.)

* * *

Torts—No fault threshold—Competent substantial evidence supported trial court's decision to submit question of permanent injury to jury

WILLIAM CHARLES STECKER and DIANE STECKER, his wife, Appellants, v. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Appellee. 4th District. Case No. 91-0689. Opinion filed November 6, 1991. Appeal from the Circuit Court for Broward County; Paul M. Marko, III, Judge. Martin J. Sperry of Sperry & Shapiro, P.A., Fort Lauderdale, for appellants. Robert H. Schwartz of Gunther & Whitaker, P.A., Fort Lauderdale, for appellee.

(PER CURIAM.) AFFIRMED. We find competent substantial evidence in the record to support the trial court's decision to submit the question of permanent injury to the jury and to sustain the jury's decision, as well as the trial court's subsequent refusal to grant a new trial. In particular, we agree with appellee that the testimony of its examining physician was sufficient to create an issue of fact as to permanent injury. In addition, the jury had before it other evidence which could have, depending upon the jury's evaluation thereof, supported the verdict of the jury and the decisions of the trial court. (ANSTEAD, DELL and POLEN, JJ., concur.)

* * *

Criminal law—Sale of cocaine within 1000 feet of school—Sentencing—Youthful offender—Improper to impose three-year mandatory minimum sentence notwithstanding defendant's youthful offender classification—On remand, trial court may consider imposing departure sentence where record clearly indicated that it deemed it obligatory to impose three-year mandatory sentence

COREY JONES, Appellant, v. STATE OF FLORIDA, Appellee. 4th District. Case No. 91-0551. Opinion filed November 6, 1991. Appeal from the Circuit Court for Palm Beach County; Tom Johnson, Judge. Cary Haughwout, West Palm Beach, for appellant. Robert A. Butterworth, Attorney General, Tallahassee, Patricia G. Lampert and Michelle Smith, Assistant Attorneys General, West Palm Beach, for appellee.

(STONE, J.) The appellant was convicted of selling cocaine within 1,000 feet of a school. Conviction for that crime requires the imposition of a three-year mandatory minimum sentence. §893.13(1)(e), Fla. Stat. (1989). Appellant was sentenced as a youthful offender pursuant to section 958.04, Florida Statutes. Notwithstanding the youthful offender sentence, however, the trial court imposed the three-year mandatory minimum sentence. We reverse the sentence and remand for resentencing.

Except as otherwise provided by law, the sentencing provisions of the Youthful Offender Act are considered the exclusive sanctions that may be imposed in a youthful offender sentence. *E.g., Salazar v. State*, 544 So.2d 313 (Fla. 2d DCA 1989); *Dean v. State*, 476 So.2d 318 (Fla. 2d DCA 1985); *Ellis v. State*, 475 So.2d 1021 (Fla. 2d DCA 1985); *Patterson v. State*, 408 So.2d 785 (Fla. 2d DCA 1982); *Whitlock v. State*, 404 So.2d 795 (Fla. 3d DCA 1981). *See also State v. Diers*, 532 So.2d 1271 (Fla. 1988).

The 1987 amendment to section 958.04(3) has recently been construed to permit the state to appeal youthful offender sentence terms below the sentencing guidelines. *See Kepner v. State*, 577 So.2d 576 (Fla. 1991). The state asserts that this amendment also served to modify the previous interpretations of the youthful offender act cited above.

In *Kepner*, the supreme court recognized that in order to permit the state to appeal youthful offender sentence terms below the sentencing guidelines, the amended statute must be construed as impliedly requiring written reasons for a downward departure from the guidelines under certain circumstances. We can discern, however, no reason to apply the *Kepner* reasoning to sentencing provisions of general law, other than guideline departures, that may be inconsistent with the purpose of the Youthful Offender Act. Section 958.04(3), Florida Statutes, refers exclusively to appeals of sentencing guideline issues. The court, in *Kepner*, recognized that the stated purposes of the Act remain valid considerations in interpreting the Act other than where necessary to give effect to the Act's other provisions.

Because the record is clear that the trial court deemed it obligatory to impose the three-year mandatory sentence, the trial court is free, on resentencing, to consider a departure sentence if deemed appropriate. (DELL and GARRETT, JJ., concur.)

* * *

Criminal law—Post conviction relief—Sentences of ninety-nine years imprisonment for sexual battery convictions exceeded statutory maximum—Claim that sentences of ninety-nine years imprisonment for kidnapping convictions exceeded statutory maximum properly denied

LUCIO JOHN SALAS, Appellant, v. STATE OF FLORIDA, Appellee. 4th District. Case No. 91-2219. Opinion filed November 6, 1991. Appeal of order denying rule 3.850 motion from the Circuit Court for St. Lucie County; Dwight L. Geiger, Judge. Lucio John Salas, Starke, pro se appellant. Robert A. Butterworth, Attorney General, Tallahassee and Joan Fowler, Assistant Attorney, West Palm Beach, for appellee.

(PER CURIAM.) Appellant appeals the summary denial of his 3.850 motion for post-conviction relief and claims that his sentences were unlawful. We reverse.

Appellant was convicted of four counts of sexual battery, two counts of kidnapping and one count of burglary with intent to commit assault and battery. He was sentenced to ninety-nine years in prison on every sentence with each sentence to run consecutively with each other and consecutive to any other active sentence. This court affirmed in *Salas v. State*, 544 So.2d 1040 (Fla. 4th DCA 1989), but vacated the conviction and sentence on the burglary charge.

Appellant subsequently filed this timely 3.850 motion for post-conviction relief asserting that his sentence is illegal and in excess of the maximum allowed by law. The trial court summarily denied the petition after considering a response filed by the state. In his motion, appellant contended that his sentences for sexual battery exceeded the statutory maximum in section 794.011(3), Florida Statutes (1984), and his sentences for kidnapping exceeded the statutory maximum in section 787.011, Florida Statutes (1984). A sentencing error which causes a defendant to be incarcerated for a greater length of time than the law permits is fundamental error which can be corrected on appeal or by the trial court in collateral attack proceedings. *Gonzalez v. State*, 392 So.2d 334 (Fla. 3d DCA 1981).

Sexual battery is a life felony punishable as provided in section 775.082, 775.083 or 775.084. *See* section 794.012, Florida Statutes. Life felonies committed after October 1, 1983 are punishable "by a term of imprisonment for life or by a term of imprisonment not exceeding 40 years." Section 775.082(3)(a), Florida Statutes (1984). In *Spivey v. State*, 526 So.2d 762 (Fla. 2d DCA 1988), the second district construed section 775.082(3)(a), Florida Statutes (1987) to prohibit a court from sentencing a defendant for a life felony of sexual battery aggravated by the use of a weapon committed after October 1, 1983, to a term of incarceration for a period of years exceeding 40. The *Spivey* court reversed a sixty year sentence and remanded for resentencing to a term of years not to exceed forty. *Cf. Ward v.*

APPENDIX 2

parted downward, sentencing defendant to two years probation. State appealed. The District Court of Appeal, Polen, J., held that drug rehabilitation provision did not provide an exception to mandatory minimum sentence required for conviction of purchasing cocaine within 1,000 feet of a school.

Reversed and remanded and question certified.

Drugs and Narcotics ⇐133

Drug rehabilitation provision did not provide an exception to mandatory minimum sentence required for conviction of purchasing cocaine within 1,000 feet of a school. West's F.S.A. §§ 397.12, 893.13(1)(e).

Robert A. Butterworth, Atty. Gen., Tallahassee, and Dawn Wynn, Asst. Atty. Gen., West Palm Beach, for appellant.

Norliza Batts, Law Offices of Norliza Batts, P.A., Fort Lauderdale, for appellee.

POLEN, Judge.

This appeal presents a factual scenario identical to those presented in *State v. Lane*, 582 So.2d 77 (Fla. 4th DCA 1991), and *State v. Baxter*, 582 So.2d 625 (Fla. 4th DCA 1991). On the authority of both *Lane* and *Baxter*, we reverse appellee's sentence and remand to the trial court with directions that appellee be sentenced to the minimum mandatory sentence. We also certify a question of great public importance.

Appellee pled guilty to purchasing cocaine within 1,000 feet of a school, in violation of section 893.13(1)(e), Florida Statutes (1989). Although the statute provides for a three-year minimum mandatory sentence, the trial court relied on section 397.12, Florida Statutes (1989), and *State v. Herrin*, 568 So.2d 920 (Fla.1990), to depart downward from appellee's sentencing guidelines score of three and one-half to four and one-half years, sentencing appellee to two years probation. Among the various reasons given for its downward departure, the court found that appellee had purchased one "rock" of cocaine intended for his personal use; the purchase of this rock took place while appellee was under the influence of alcohol; appellee suffered from substance abuse addictions; and appellee was both amenable to and capable of meaningful rehabilitation back into society.

This court has previously held that section 397.12 does not provide an exception to the minimum mandatory sentencing requirement of section 893.13(1)(e). *Lane*, 582 So.2d at 78. *See also State v. Ross*, 447 So.2d 1380 (Fla. 4th DCA), *rev. denied*, 456 So.2d 1182 (1984). Further, we recognize that *Herrin* concerned the 1987 version of section 893.13(1)(e), before the 1989 amendment which added the three year minimum mandatory clause to that section. However, we note Judge Anstead's special concurrence in *State v. Liataud*, No. 90-3221, — So.2d — (Fla. 4th DCA July 17, 1991), and we are not unsympathetic to the premise that, but for this court's opinions in *Lane*, *Baxter*, and now *Liataud*, there would be sound reasoning to support the trial judge's actions concerning this appellee. Accordingly, we now certify to the Florida Supreme Court the following question:

> 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)?

REVERSED and REMANDED and QUESTION CERTIFIED.

DELL and GUNTHER, JJ., concur.

**Daniel RICIGLIANO, Louis Be
Robert Barnwell, Anthony Ma
Jacqueline Henwood, Charles
Russel Pizzutto, David Modica
Modica, Deborah W. Scoppec
ert A. Scoppechio, John R.
Donna M. Modica, Robert Ro
uel Rich, Martin Kamin, Lind
individually, and on behalf of
similarly situated, Appellants,**

v.

**PEAT, MARWICK, MAIN & CO
Timothy Hart, Henry Gayer, a
Cobb, all individually and joi
pellees.**

No. 91-1215.

District Court of Appeal of F
Fourth District.

Aug. 21, 1991.

Rehearing and Rehearing En
Denied Oct. 9, 1991.

Suit was brought against ac
firm and three of its employees fo
misrepresentation and fraud in the
cial statements regarding strength
licly held corporation. The Circu
for Broward County, Patricia W.
J., stayed suit based upon previous
similar federal court action. On
treated as petition for writ of certio
District Court of Appeal held th
were sufficiently similar to warra

Certiorari denied.

Farmer, J., concurred in res
filed opinion.

Action ⇐69(5)

State and federal actions alleg
accounting firm's financial represe
regarding publicly held corporati
false and fraudulent were sufficien
ilar to warrant stay of the later fil
action, even though there was a d
in the parties to the two actions.

APPENDIX 3

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of Appendices has been furnished to James J. Carney, Assistant Attorney General, Elisha Newton Dimick Building, Suite 204, 111 Georgia Avenue, West Palm Beach, Florida 33401 by mail this 9th day of December, 1991.

Of Counsel