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IN THE SUPREME COURT OF THE STATE OF FLORIDA

Case No: 79,197

4TH DCA Case No: 91-1404

MERLENE WALKER,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.
_____/

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 was convicted of purchase of cocaine within one thousand feet of a school, in violation of Section 893.13(1)(e), Florida Statutes (1989). Despite the existence of a three year mandatory minimum sentence for that offense, the trial court found Petitioner to be drug dependent, and she was ordered to serve a term of three (3) years probation, on the authority of Section 397.12, Florida Statutes (1989).

On appeal, the Fourth District Court of Appeal reversed this disposition, citing its prior decisions in State v. Baxter, 16 F.L.W. 1561 (Fla. 4th DCA June 21, 1991, and State v. Scates, 16 F.L.W. 2203 (Fla. 4th DCA August 21, 1991), which held that the three year mandatory minimum set forth in Section 893.13(1)(e) supersedes and precludes the operation of Section 397.12, Florida Statutes (1989);

In State v. Scates, 16 F.L.W. 2203 (Fla. 4th DCA August 21, 1991), the Fourth District Court of Appeal cited State v. Baxter, supra, when it certified the identical issue raised in those cases as a question of great public importance to this Court. State v. Scates, supra. The certified question is:

> MAY A TRAIL 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).

Petitioner timely filed her Petition for Review and this Court has accepted jurisdiction.

Petitioner testified that she had been taking drugs several months before her arrest. That she was under the influence of drugs at the time of the purchase. (R6). That she wanted to get more cocaine at time of the purchase; that since her arrest she is amenable to and desires rehabilitation, and it did not matter whether it be inpatient or out-patient status. (R7). Additionally, Petitioner, in her Motion For Departure, indicates that she is a single parent with three dependent minor children, a college graduate, had enrolled in vocational classes and sought employment, all since her arrest. (R20).

More importantly, the court, in its colloquy, explaining the consequences of violating probation to Petitioner, made it clear that the court was exercising its discretionary jurisdiction. (R1-14).

SUMMARY OF ARGUMENT

The Respondent has failed to demonstrate an abuse of discretion sufficient to warrant a reversal of the lower court's exercise of discretion under Section 397.12. Moreover, contrary to the Respondent's suggestion that Section 893.13 (1) (e) controls over Section 397.12, Section 893.13 (1) (e) and Section 397.12 are valid and connstitutional legislative expessions which can be reconciled regarding the apparent conflict respecting the sentencing of a violation of Section 893. 13 (1) (e). Respecting the sentencing aspects for violations of Section 893, particularly Section 893. 13 (1) (e) where the court may exercise its discretion, Section 397.12 controls if the court complies with the legislative intent of Chapter 397. Consequently, there has been no abuse of discretion and, inasmuch as there was no abuse of discretion on the part of the Trial Court, the District Court's reversal should be reversed, vacated and set aside.

ARGUMENT

THE TRIAL JUDGE HAS NOT ABUSED HIS DISCRETION AND THE DOWNWARD DEPARTURE REPRESENTS A VALID EXERCISE OF DISCRETION OF THE COURT GIVING FORCE AND EFFECT TO A VALID LEGISLATIVE EXPRESSION FOR A VIOLATION OF SECTION 893

Perhaps the most often repeated cliche in Appellate decisions is that the judgment of a trial court arrives in the Appellate court clothed in a presumption of correctness. Essix v. State, 347 So. 2d 664 (Fla. 3DCA 1977); Reinhold Const., Inc. v. City Council for City of Vero Beach, 429 So. 2d 699 (Fla. 4DCA 1987). The burden upon the Appellant in this case, therefore, would require a showing that the departure was an abuse of discretion.

To meet its burden, Appellant urges Section 397.12 pertains to possession not purchase and that Section 893.13 (1)(e) takes precedent over Section 397.12, or, alternatively, Section 397.12 only relates to defendants who have been convicted of possessing illegal drugs.

When the language of a statute is clear and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory interpretation and construction. Statute must be given its plain and obvious meaning. Courts are without power to construe an unambiguous statute in a way which would extend, modify or limit, its express terms or its reasonable and obvious implications. To do so would be an abrogation of legislative power. Holly v. Areld, 450 So. 2d 217 (Fla. 1984). The Rules of Construction are useful only in case of doubt, they should never be

used to create doubt, but only to remove it. State v. Eagan, 287 So. 2d 1 (Fla. 1973). In the interpretation of a statute, it will be presumed that the legislature intended every part thereof for a purpose. Gerard Trust Co. v. Tampashores Development Co., 117 So. 786 (Fla. 1928); Alexander v. Booth, 56 So. 2d 716 (Fla. 1952); Lee v. Gulf Oil Corp., 4 So. 2d 868 (Fla. 1941). In the absence of a showing to the contrary, all laws are presumed to be consistent with each other. Capella v. Gainesville, 377 So. 2d 658 (Fla. 1979). Where two statutes are found to be in conflict, however, rules of statutory construction must be applied to reconcile to conflict, if possible. DeBolt v. Dept. of Health and Rehabilitative Services, 427 So. 2d 221 (Fla. 1 DCA 1983). The courts presume that statutes are passed with knowledge of prior existing statutes and will favor a construction that gives a field of operation to both rather than construe one statute as being meaningless or repealed by implication. Oldham v. Rooks, 361 So. 2d 140 (Fla. 1978). It is presumed that the legislature did not intend to keep contradictory enactments in the statute books, or to effect so important a measure as the repeal of a law without expressing an intention to do so. An interpretation leading to such a result should not be adopted unless it is inevitable. Curry v. Lehman, 47 So. 18 (Fla. 1908); Tamiami Trail Tours, Inc. v. Tampa, 31 So. 2d 468 (Fla. 1947); State ex rel. School Board v. Dept of Education, 317 So. 2d 68 (Fla. 1975). Hence, where it is possible, it is the duty of the courts to adopt that

construction of a statutory provision which harmonizes and reconciles it with other statutory provisions. In Interest of N., 279 So. 2d 50 (Fla. 4 DCA 1973); Mann v. Goodyear Tire and Rubber Co., 300 So. 2d. 666 (Fla. 1974).

In its pertinent part, Section 397.10 clearly expresses the legislative intent respecting individuals experiencing substance abuse problems resulting in violations of the law, particularly violations of Chapter 893, as follows:

> 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 by the Department of Health and Rehabilitative Services. It is the further intent of the legislature to encourage trial judges to use their discretion to refer persons charged with, or convicted of, violation of laws relating to drug abuse or violation of any law committed under the influene of a narcotic drug..... in lieu of, or in addition to, imposition of criminal penalties.

Section 397. 12 in its pertinent part provides that:

> When any person, including any juvenile, has ben charged with or convicted of a violation of any provison of Chapter 893 or 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 licensed by the Department under the provisons of this chapter. If referred by the court, the referral may be in lieu of or on addition to final adjudication, imposition of any penalty or sentence, or any other similar action.

A review of Section 397.10 and Section 397.12 clearly supports that the legislature intended to provide an alternative to imprisonment for those individuals experiencing substance abuse problems, committing violations of Chapter 893, particularly while under the

influence of a controlled substance, and further vesting and encouraging trial judges to use the discretion provided for to refer such persons to an appropriate drug treatment program, provided such persons are capable of rehabilitation. On the other hand, Section 893.13 (1)(e) merely defines those acts which constitute a crime and provide for a penalty for transgression.

The fact that the penalty provided for by Section 893.13 (1)(e), although couched in mandatory language, may not be the same or may be different from a penalty imposed under Chapter 397, does not necessarily suggest a conflict in the two statutory provisions, depending upon the circumstances of the case. For example, in the proper case where an accused is charged with a violation of Chapter 893, including 893.13 (1)(e), and the facts before the court suggets that the accused is a controlled substance abuser but there are mitigating circumstances evidencing that the accused is capable of rehabilitation, then Section 397.12 empowers the court to exercise its discretion to alternatively sentence the accused to a treatment program. On the other hand, however, if the accused is in a similar position as illustrated above, excepting there be no mitigating circumstance evidencing that the accused is capable of rehabilitation, or the accused is charged or convicted of the sell, manufacture, or delivery, or possess with the intent to sell a controlled substance prohibited by Section 893.13(1)(e), then the court, under Section 893.13 (1)(e), not only would not likely to be inclined to ascertain

whether any mitigating circumstances exist but would be duty bound to impose a mandatory sentence, as such does not come within the legislative intent of Chapter 397. In other words, in Chapter 397 the legislature concerned itself with the drug abuser and efforts to rehabilitate the same rather than incarcerate them if capable of rehabiliation and the abuser is charged with or convicted of a violation of Chapter 893 which falls within the legislative intent of Chapter 397. To hold otherwise would result in an irreconcilable conflict between the clear legislative intent expressed by the provisions of Chapter 397 and the expressed language of Section 893.13 1)(e); Put another way, by implication the expressions of Section 893. 13 (1)(e) would repeal the express and intended discretion with which Chapter 397 has vested upon trial judges. Petitioner submits that such a result is unwarranted, as courts may not, by implication, read into a statute that which is not intended to be there or make an implication which the language of the statute does not warrant. 73 Am Jur. 2d Statutes, Section 210. Additionally, the United States Supreme Court in United States v. Bass, 404 U.S. 336, 92 S. Ct. 515, 522 (1971) announced that:

> "Ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." (Citations omitted). In various ways over the years, we have stated that "when choice has to be made between two readings of what conduct congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite." 92 S. Ct. at 552.

In Busic v. United States, 100 S. Ct. 1747 (1980), the Court held, in connection with the rule of lenity, a more specific statute will be given precedence over a more general one, regardless of their temporal sequence. 100 S. Ct. 1753 citing Preiser v. Rodriguez, 411 U.S 475, 489-490, 93 S.Ct. 1827, 1836, 36 L. Ed. 2d 939 (1973). The The Rule of lenity is no stranger in the law and courts of Florida. See Section 775.021, Florida Statutes; State v, Carroll, 378 So. 2d 4 (Fla. 4DCA 1979); Armstrong v. Edgewater, 157 So. 2d 422 (Fla. 1963). Therefore, the fact that the legislature in its failure to repeal or otherwise positively and affirmatively repeal Chapter 397 or Sections 397.10 and 397.12 in particular, in the session during which Section 893.13 (1)(e) was passed lends support to the conclusion that Sections 397.10 and 397.12, as well as Chapter 397 itself are viable, valid and constitutional expressions of the legislature; and the doctrine or rule of lenity, assuming there was some question concerning the trial judge's discretion to make an alternative sentence under Section 397.10 and Section 397.12 in light of the amendment in Section 393.13(1)(e), would require holding that in the case at bar that the trial judge was well within his jurisdiction under the circumstances of this case to make the departure under Section 397.12. To hold otherwise would constitute a violation of Appellee's due process rights secured under the United States Constitution and the Florida Constitution.

CONCLUSION

Based upon the foregoing agruments and authories cited herein, Petitioner requests this Honorable Court to affirm the trial judge's sentence and reverse the District Court's Decision.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Brief on Merits has been furnished to Carol Cobourn Asbury, Esq., Assistant Attorney General, Attorney for Respondent, 111 Georgia Avenue, Suite 204, West Palm Beach, Florida 33401, by mail/hand delivery, this 1 day of May, 1992.

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JAMES O. WALKER, III