IN THE SUPREME COURT OF FLORIDA

SALVATORE VOLA,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

Case No. 79,455

PETITIONER'S INITIAL 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 Salvatore Vola pled guilty to purchase of cocaine within 1,000 feet of a school (R 4, 6, 17). Over objection by the state (R 4, 19) the trial court sentenced Petitioner pursuant to a downward departure and did not impose a three year mandatory minimum sentence (R 18, 53-54). The sentence imposed was two years community control, with Petitioner required to submit to evaluation for counseling or placement in alcohol, drug, and psychological rehabilitation; to submit to drug or alcohol tests at any time; and to attend 90 Narcotics Anonymous meetings within 90 days (R 20, 53-54).

At the sentencing hearing, Petitioner testified that on the date in question he purchased two cocaine rocks for $10 each at a spot determined by undercover police officers. He was under the influence of cocaine and alcohol at the time and his judgment was impaired. He had an active dependency or addiction of several years standing to cocaine, marijuana, and alcohol. He was spending between $300 and $500 a week on drugs. At the time of his arrest he was not aware that he was within 1,000 feet of a schoolyard. He did not know there was a school in the area. The arrest took place at about 11:00 on a Sunday night (R 7-10). At the time of sentencing he had been accepted in Challenge, a drug rehabilitation program (R 13).

The trial judge filed a lengthy written order of departure relying on Section 397.12, Florida Statutes, to avoid the three year mandatory minimum sentence of Section 893.13(1)(e), Florida Statutes. The court's order stated that the cocaine purchased by

Petitioner had been manufactured by the Broward Sheriff's Office and that the sale, by an undercover police officer posing as a street level drug dealer, was a reverse sting like numerous others conducted at the same location. The order found that Petitioner suffered from substance abuse addiction and was likely under the influence of alcohol or cocaine at the time of his arrest, and that Petitioner's judgment was severely compromised. The order found that Petitioner was not a threat to society but desired treatment and rehabilitation for his addiction, and that Petitioner was amenable to and capable of meaningful rehabilitation. The order also found that Petitioner's guilt was ameliorated because Petitioner did not know he was within 1,000 feet of a school, the school was closed at the time, and the site of the transaction was selected by the police (R 49-52).

The state appealed Petitioner's sentence to the Fourth District Court of Appeal. On August 28, 1991 the court issued an opinion reversing and remanding for resentencing and holding that the three year mandatory minimum took precedence over Section 397.12 (copy in appendix to this brief). On January 29, 1992 the Fourth District issued an opinion on rehearing certifying as a question of great public importance the same question set out in its opinion in State v. Scates, 585 So.2d 385 (Fla. 4th DCA 1991) (copy in appendix).

Notice to invoke discretionary jurisdiction was filed on February 26, 1992 (copy in appendix). Following motions concerning appointment of counsel, this Court on April 3, 1992 appointed the Public Defender of the Fifteenth Judicial Circuit to represent Petitioner and ordered his brief to be served by May 25, 1992.

SUMMARY OF ARGUMENT

The trial court was within the authority granted to it by the legislature when it employed Section 397.012, Florida Statutes (1989) to implement its decision not to impose the three year mandatory minimum sentence otherwise applicable to Petitioner's conviction for purchasing cocaine within 1,000 feet of a school.

ARGUMENT

THE TRIAL COURT PROPERLY USED SECTION 397.012, FLORIDA STATUTES (1989) TO AUTHORIZE ITS AVOIDANCE OF THE THREE YEAR MANDATORY SENTENCE OTHERWISE APPLICABLE TO PETITIONER'S CONVICTION FOR VIOLATION OF SECTION 893.13(1)(e), FLORIDA STATUTES (1989).[1]

Section 397.011(2), Florida Statutes (1989) provides (emphasis added):

> 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. 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 licensed by the Department of Health and Rehabilitative Services, pursuant to the provisions of this chapter, provided the director of such program approves the placement of the defendant in such program. Such required participation may be imposed in addition to or in lieu of any penalty or probation, and program participation may not exceed the maximum length of sentence possible for the offense.

In addition, Section 397.10, Florida Statutes (1989) continues with the following expression of 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

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[1] This issue is also pending before this Court in Scates v. State, Case No. 78,533; Liautaud v. State, Case No. 78,626; Lane v. State, Case No. 78,534; Jenkins v. State, Case No. 78,916; and Forrest v. State, Case No. 78,955.

> 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 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.

Thus, it is the policy of this state, as expressed in the above-cited statutes, that persons found to be in violation of Chapter 893, Florida Statutes (1989) should not be imprisoned, but, in the trial court's discretion, should be alternatively sentenced to a program of rehabilitation which fits the offender's needs. This intent is implemented by way of Section 397.12, Florida Statutes (1989), which provides (emphasis added):

> 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, Department of Health and Rehabilitative Services, Department of Corrections, or Parole Commission, whichever has jurisdiction over that person, may in its discretion, require that the person charged or convicted to participate in a drug treatment program licensed by the department under the provisions of this Chapter. If referred by the court, the referral may be in lieu of, or in addition to, final adjudication, imposition of any penalty or sentence, or any other similar action. If the accused desires final adjudication, his constitutional right to trial shall not be denied. The court may consult with, or seek the assistance of any agency, public or private, or any person concerning such a referral. Assignment to a drug program may be contingent upon budgetary considerations and availability of space.

In its 1988 session, the legislature left Chapter 397.12 as a viable alternative to sentencing of drug abusers under Chapter 893. Chapter 88-122, Laws of Florida.

Here, the trial court exercised the discretion granted to it by this legislative scheme. Petitioner pled guilty to the offense

of purchasing cocaine within 1,000 feet of a school, a first degree felony punishable by up to thirty years imprisonment, a minimum mandatory sentence of three calendar years, and an automatic presumptive sentence of three and a half to four and a half years incarceration (R 46). At his sentencing hearing, Petitioner presented compelling evidence of his addiction to alcohol and cocaine, on which he spent $300 to $500 per week (R 8-9). In addition, at the time of the drug purchase in question, Petitioner was under the influence of alcohol and cocaine (R 8). At the time of sentencing, Petitioner had been accepted into Challenge, a drug rehabilitation program (R 13).

Consequently, Petitioner was an excellent candidate for the application of Chapter 397. In order to implement the legislatively approved rehabilitative goals of the statute, the trial court adjudged him guilty of purchasing cocaine within 1,000 feet of a school and placed him on community control for a period of two years, with special conditions that he submit to evaluation for alcohol, drug, and psychological rehabilitation; submit to drug and alcohol testing; and attend 90 Narcotics Anonymous meetings in 90 days (R 54).

This disposition was justified in a lengthy order by the trial court. In support of the downward departure from the sentencing guidelines, the trial court found that Petitioner was under the influence of drugs and alcohol at the time that he committed the crime and that his judgment was impaired thereby (R 49-50). These were valid reasons for a disposition outside the sentencing guidelines. Barbera v. State, 505 So.2d 413 (Fla. 1987). The trial court further found that Petitioner was not a threat to

society, that he sincerely desired rehabilitation and treatment for his substance abuse, and that he was amenable to rehabilitation (R 50). This, too, has been held a sufficient basis for departure. State v. Sachs, 526 So.2d 48 (Fla. 1988).

The Fourth District relied in part in its decision reversing the sentence on State v. Ross, 447 So.2d 1380 (Fla. 4th DCA 1984). That case, however, deals with a robbery prosecution, not one for violation of the drug abuse laws contained in Chapter 893. The latter, but not the former, are expressly mentioned in the statement of legislative intent contained in Section 397.011(2). The latter, but not the former, are specifically named in Section 397.12 itself: "a violation of any provision of Chapter 893." Thus, Ross is not applicable to the present case, which falls directly within the operation of Chapter 397 by its express terms.

Ross is further distinguished from the instant case by operation of Section 948.01(13), Florida Statutes (1991), which provides:

> If it appears to the court upon a hearing that the defendant is a chronic substance abuser whose criminal conduct is a violation of chapter 893, the court may either adjudge the defendant guilty or stay and withhold the adjudication of guilt; and, in either case, it may stay and withhold the imposition of sentence and place the defendant on drug offender probation.

The authorization provided by this statute is limited solely to violations of Chapter 893 and could, therefore, not assist the defendant in Ross. It is, by its own terms, however, applicable to all drug offenders, no matter what subsection of chapter 893 defines their offense.

Section 948.01(13) is entirely consistent with the legal effect of the omission from the mandatory minimum prison terms defined in Section 893.13(1)(e), Florida Statutes (1989), of the prohibition, found in Sections 893.135 [drug trafficking], 784.08(3) [crimes committed against the elderly], 775.087 [crimes committed with firearm], and 775.0823 [violent crimes against law enforcement officers], Florida Statutes (1989), that the mandatory minimum sentence "shall not be suspended, deferred or withheld." In contrast with each of these statutes, Section 893.13(1)(e) is conspicuous by the fact that these words precluding the trial judge from staying, suspending, or withholding the mandatory sentence are absent.

The restrictive language contained in the other mandatory minimum statutes cannot be implied against the instant statute which does not utilize it. As stated in St. George Island Ltd. v. Rudd, 547 So.2d 958, 961 (Fla. 1st DCA 1989):

> Where the legislature uses exact words in 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.

Since it must be presumed that the legislative inclusion of the proscription against suspending, deferring or withholding sentence has meaning where it is added to a penal statute, the exclusion of that sentence from a similar penal statute likewise must have meaning, namely, that such suspension, deferral, or withholding of the sentence is not precluded. Thus, the trial judge sentencing a defendant for a drug transaction committed within 1,000 feet of

a school is still empowered to suspend, defer, or withhold the mandatory sentence which must otherwise be imposed.

In reversing Petitioner's sentence, the Fourth District Court of Appeal appears to have misconstrued the legislative will expressed in Chapter 953 and Section 397.12, Florida Statutes (1989), which expressly provide alternatives to incarceration for substance abusers like Petitioner. By its holding the district court appears to have limited the circumstances in which a sentencer can exercise discretion under Chapter 953 and Section 397.12 to those cases where merely possessory offenses are involved, based on one phrase contained in subsection (2) of Section 397.011(2), Florida Statutes, see State v. Lane, 582 So.2d 77 (Fla. 4th DCA 1991) (cited by the district court in the instant opinion):

> 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 licensed by the Department of Health and Rehabilitative Services pursuant to the provisions of this chapter...

(emphasis added.)

However, this phrase must be considered in the context of the entire subsection (2),[2] which defines the legislature's intent and has no limiting language at all. Likewise, subsection (1) of the

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[2] "(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...."

same statute places no limitation on persons dependent on drugs controlled by Chapter 893, as is Petitioner.[3] Furthermore, by focusing on only one portion of the preamble of Chapter 397, the district court must have overlooked Sections 397.10[4] and 397.12,[5] which do not circumscribe their application merely to possessory offenses.

The district court's limitation of the sentencer's discretion to merely possessory offenses overlooks two principles of statutory construction. First,

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[3] "(1) It is the purpose of the chapter to encourage the fullest possible exploration of ways by which the true facts concerning drug abuse and dependence may be made known generally and to provide a comprehensive and individualized program for drug dependents in treatment and aftercare 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."

[4] "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 further the 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 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."

[5] "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...."

> 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 cited therein. Second, where a criminal statute is susceptible of different interpretations, it must be construed in favor of the accused. E.g., Lambert v. State, 545 So.2d 838 (Fla. 1989). Application of these principles to the present case would result in affirmance of the trial court's disposition.

The trial court did not abuse its discretion in sentencing Petitioner because the instant offense is one which is included within the range of offenses for which alternative treatment is provided for under Section 397.12. Moreover, the trial court was empowered to suspend, withhold or defer, Petitioner's mandatory sentence and place Petitioner on community control. Petitioner's sentence in conformity with the statutory scheme must therefore be upheld, and the decision of the Fourth District Court of Appeal rejecting his argument should be quashed.

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 Don M. Rogers, Assistant Attorney General, Elisha Newton Dimick Building, Room 240, 111 Georgia Avenue, West Palm Beach, Florida 33401 this 12th day of May, 1992.

Counsel for Petitioner