047

FILED
SID J. WHITE
JUL 2 1992
CLERK, SUPREME COURT
By _____
Chief Deputy Clerk

IN "HE SUPREME COURT OF FLORIDA

CASE NO. 79,603

MICHAEL JOHN MANNING,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

****

RESPONDENT'S ANSWER BRIEF ON THE MERITS

****

ROBERT A. BUTTERWORTH
Attorney General
Tallahassee, Florida

MICHELLE A. SMITH
Assistant Attorney General
111 Georgia Ave., Suite 204
West Palm Beach, FL 33401
Florida Bar #881235
(407) 837-5062

Counsel for Respondent

I OF CONTENTS

TABLE OF CITATIONS

CASES **PAGE**

OTHER AUTHORITIES

PRELIMINARY STATEMENT

Respondent was the Appellant in the Fourth District Court of Appeal and the Prosecution in the Seventeenth Judicial Circuit, Criminal Division, in and for Broward County, Florida. The Petitioner was the Appellee in the Fourth District Court of Appeal, and the Defendant in the Criminal Division of the Circuit Court of the Seventeenth Judicial Circuit, in and for Broward County, Florida.

In the brief, the parties will be referred to as they appear before the Supreme Court of Florida except that Respondent may also be referred to as the State. The Petitioner may be referred to as Ms. Manning.

The following symbols will be used:

"R" Record on Appeal

"PB" Petitioner's Brief on the Merits

All emphasis has been added unless otherwise indicated.

SUMMARY OF THE ARGUMENT

The Fourth District Court of Appeal was correct in reversing and remanding Petitioner for resentencing to a term which includes the mandatory minimum term of imprisonment for three calendar years in accordance with Fla. Stat. §893.13(1)(e). Section 397.12 is not an exception to the minimum mandatory three year sentence required for conviction under Florida Statutes section 893.13(1)(e), and therefore, the trial court erred in imposing a downward departure.

In addition, the Fourth District Court's decision must be upheld because the record lacks competent, substantial evidence to support a finding that a reasonable possibility exists that rehabilitation would be sucessful if Petitioner's sentence was seduced.

ARGUMENT

THE TRIAL COURT ERRED IN DEPARTING DOWNWARD FROM THE THREE YEAR MANDATORY MINIMUM SENTENCE AND IN SENTENCING PETITIONER ALTERNATIVELY PURSUANT TO FLORIDA STATUTES SECTION 397.12.

At bar, Petitioner pled guilty to purchasing cocaine within 1,000 feet of a school in violation of section 893.13(1)(e)(1989) (R 5, 28). Section 893.13(1)(e) provides a mandatory minimum sentence of three calendar years for such a conviction. The trial court relied on Barbera v. State, 505 So. 2d 413 (Fla. 1987) and Florida Statutes section 397.12 to circumvent the language of the statute imposing the three year mandatory sentence (R 15-16, 29-31). Petitioner was therefore sentenced to two and a half years probation for purchasing cocaine within 1,000 feet of a school (R 15, 28), in clear contravention of section 893.13(1)(e). A5 such, the trial court erred in imposing a downward departure sentence.

In State v. Ross, 407 So. 2d 1380 (Fla. 4th DCA 1989), the Fourth District Court of Appeal held that section 397.12 does not provide an exception to the minimum mandatory sentencing requirements of section 893.13(1)(e). In doing so, the Fourth District Court of Appeal looked at a very similar issue. In Ross, the defendant was found guilty of two firearm offenses requiring a mandatory minimum three year sentence. The trial court therein sentenced the defendant to probation and a drug rehabilitation program relying on Florida Statutes section 397.12. In reviewing the defendant's sentence, the court in

Ross held that section 397.12 was not an exception to the mandatory sentencing requirements of the firearm sentencing statute. Id. at 1393.

Likewise at bar, and for the same reason cited in Ross, section 397.12 is not an exception to the minimum mandatory three year sentence required upon conviction of violating section 893.13(1)(e). As stated in Ross, section 893.13(1)(e)(1) is the later promulgated statute. It took effect as currently written on June 17, 1989. Ch. 89-534, Laws of Florida (1989). Section 397.12 first appeared in similar form in 1973, and took effect on July 1, 1973. Ch. 73-75, Laws of Florida (1973). Therefore, section 893.13(1)(e)(1) should prevail as the last expression of legislative will. State v. Ross, 447 So. 2d at 1382. As stated in Ross, "[t]he legislature, in passing the later statute, is presumed to know the earlier law. And, unless an explicit exception is made for an earlier statute, the later statute controls." Id.

Clearly, Florida Statutes section 893.12(1)(e)(1) is unambiguous. It provides that a defendant "shall be sentenced to a minimum *term* of imprisonment of three calendar years and shall not be eligible for parole or statutory gain time.... The statute's mandate is therefore clear. Minimum mandatory sentences are matters of legislative perogative that are nondiscretionary. Charatz v. State, 577 So. 2d 1298, 1299 (Fla. 1981). Merely because section 893.13(1)(e) does not state that the trial court shall not suspend, defer or withhold sentencing,

does not mean the trial court has discretion to avoid the minimum mandatory term. The word "shall" is mandatory. Well-settled rules of statutory construction require that the statute's terms be construed according to their plain meaning.

In addition, it is significant that there is no existing indication that the legislature intended section 397.12 to serve as an exception to section 893.13(1)(e)(1), a mandatory term of imprisonment. Ross v. State, 447 So. 2d at 1382-1383. Section 893.13, by its terms, is limited to possession. See State v. Edwards, 456 So. 2d 575 (Fla. 2nd DCA 1985). The present case involves a purchase within 1,000 feet of a school.

Even assuming that there is some inconsistency between sections 397 and 893, the statutes should be given the effect designed for them unless a contrary intent clearly appears. State v. Gadsden County, 63 Fla. 626, 58 So. 232, 235 (1912); State v., Dunmann, 427 So. 2d 166 (Fla. 1983). There is no positive or irreconcilable repugnancy between the provisions of sections 397 and 893. The first rule of statutory construction is that words are to be given their plain meaning. It is equally an axiom of statutory construction that an interpretation of a statute which leads to an unreasonable or ridiculous conclusion, or a result obviously not designed by the legislature, will not be adopted. Drury v. Harding, 461 So. 2d 104 (Fla. 1984). Furthermore, "when two statutes are inconsistent or in conflict, a more specific statute covering a particular subject, is controlling over a statutory provision covering the same subject

in more general terms." American Healthcorp of Vero Beach, Inc. v. Department of Health and Rehabilitative Services, 471 So. 2d 1312, adopted, 488 So. 2d 824 (Fla. 1st DCA 1985). In such a case, the more narrowly-drawn statute operates as an exception to or qualification of the general terms of the more comprehensive statute. Floyd v. Bently, 496 So. 2d 862, review denied, 504 So. 2d 767 (Fla. 2nd DCA 1986).

Florida Statutes section 397.12 (1989) refers to those people who have been convicted of a violation of any provision of chapter 893. This statute is general in its terms and refers generally to the law of the subject or to section 893. U.S. v. Rodriquez-Rodriguez, 863 F. 2d 830 (11th Cir. 1989). However, section 893.12, which was enacted in 1973 and became effective on July 1, 1973, states that a person who violates section 893.13(1)(f) or (1)(g) relating to possession *may* be required to participate in a drug rehabilitation program pursuant to chapter 397, at the discretion of the trial judge. Ch. 73-331, Laws of Florida. Statutes relating to the same subject and having the same purpose should be construed together if they are compatible, particularly where statutes are enacted at the same legislative session. Pichard v. Jax Liquors, Inc., 449 So. 2d 926, review denied, 511 So. 2d 298 (Fla. 1st DCA 1986). Reading the two statutes, in pari materia under the statutory construction principle of ejusdem generis (where general words or principles, when appearing in conjunction with particular classes of things, will not be considered broadly, but will be limited to the

meaning of the more particular and specific words), it is clear that the legislative intent was to limit section 397.12 to those defendants who violate section 893.13(1)(f) or (1)(g) by possessing contraband. This is also consistent with the general principle mentioned previously, that when two statutes are inconsistent or in conflict, a more specific statute covering a particular subject is controlling over a statutory provision covering the same subject in more general terms.

Clearly, section 893.13(1)(e) is unambiguous. The statute states: "shall be sentenced to a minimum term of imprisonment of 3 calendar years and shall not be eligible for parole or statutory gain time.... Fla. Stat. §893.13(1)(e) (1989). The statute's mandate is clear! Using well-known statutory construction principles, one must conclude that section 397 is not an exception to the mandatory requirements of section 893.13(1)(e). Any other interpretation would lead to an absurd or unreasonable result and would render section 893.13(1)(e) purposeless. State v. Webb, 398 So. 2d 820, 824, (Fla. 1981). What would be the purpose having a minimum mandatory sentence if any defendant could declare his "heart felt" desire for rehabilitation and, thus, avoid the minimum mandatory? What defendant would not make such a declaration and what defense counsel would not instruct his client to make a declaration? The clear legislative intent behind section 893.13(1)(e) is to create a drug free zone around schools. This intent would be rendered meaningless were the minimum mandatory sentence so easily

avoided. Consequently, the plain meaning of the statute should prevail.

Based on the foregoing, Respondent maintains that, pursuant to Ross, supra, and the rules of statutory construction, Florida Statutes section 397.12 is not an exception to the mandatory requirements of section 893.13(1)(e)(1). As such, the sentence imposed in the trial court was an illegal sentence and the Fourth District Court of Appeal was correct in reversing and remanding Petitioner for resentencing to a term which includes the minimum term of three calendar years, in accordance with section 893.13(1)(e)(1).

However, even assuming arquendo that a downward departure in Petitoner's sentencing did not violate the mandatory minimum provision in section 893.13(1)(e), substance abuse, standing alone, will not justify a departure where the record lacks substantial, competent evidence to support a finding that a reasonable possibility exists that rehabilitation will be successful. Herrin v. State, 568 So. 2d 920 (Fla. 1980). This court in Herrin, modified Barbera v. State, 505 So. 2d 413 (Fla. 1987) by imposing two prerequisites which must be met before a downward departure sentence can be imposed: (1) a defendant's substance abuse must be considered along with (2) his or her amenability to rehabilitation. Herrin v. State, 568 So. 2d 922.

Petitioner testified that he started using alcohol since he was 14 years old, went into a two (2) year program at age 19, completed it and stayed clean for 13 years. He then had

two deaths in the family and did not know how to deal with it, so he started back using cocaine eight (8) years ago (R 8). However, at the time of this offense, Petitioner was not using cocaine (R 10), he had stopped using cocaine six or seven months before. (R 13).

Although there was testimony that Petitioner had been going to BARK and NA meetings (R 9) this new-found desire to achieve counselling only came about after this arrest, despite Petitioner's eight year drug binge. His previous two (2) years rehabilitation was triggered only by a previous arrest (R 12) and quickly terminated when things started going wrong in his life. Petitioner immediately began using drugs and continued for eight (8) years, culminating in his arrest. In fact, at the time of his arrest, Petitioner claims he was drunk, he had left to go get a prostitute, "when all of a sudden, he was arrested for crack cocaine" (R 14). Respondent maintains that the record is devoid of *any* evidence from which the trial court could find Petitioner amenable to rehabilitation. Petitioner's desire for rehabilitation seems only to be triggered once he has been arrested. Respondent submits that more that Petitioner's self-serving statements were necessary before the trial court could make an adequate finding that a reasonable possibility existed that he would be amenable to rehabilitation. In short, there is no competent substantial evidence to support a reasonable possibility that if the Petitioner's sentence was reduced in order to permit treatment for his dependency, such treatment

would be successful. Under these circumstances, to permit drug dependency to justify a departure in this case, would "thwart the guidelines purpose of providing more uniformity in sentencing". Consequently, under Herrin, the trial court erred in departing downward on the basis of substance abuse in this case.

Therefore, in light of the foregoing arguments, this Court must affirm the decision of the Fourth District Court reversing Petitioner's original sentence, and remanding for resentencing to a term which includes the minimum mandatory term of three calendar years.

CONCLUSION

WHEREFORE, based upon the foregoing arguments and reasons cited herein, Petitioner respectfully request this Honorable Court to AFFIRM the decision of the Fourth District Court of Appeal.

Respectfully submitted,

ROBERT A. BUTTERWORTH
Attorney General
Tallahassee, Florida

Michelle A. Smith
MICHELLE A. SMITH
Assistant Attorney General
Florida Bar No.881235
111 Georgia Avenue, Suite 204
West Palm Beach, FL 33401
(407) 837-5962

Counsel for Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Brief has been furnished to Allen DeWeese, Assistant Public Defender, Fifteenth Judicial Circuit, Governmental Center/9th Floor, 301 North Olive Avenue, West Palm Beach, Florida 33401, this 29th day of June, 1992.

Michelle A. Smith
Of Counsel