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IN THE SUPREME COURT OF FLORIDA

MICHAEL JOHN MANNING,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

Case No. 79,603

PETITIONER'S INITIAL BRIEF ON THE MERITS

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TABLE OF [illegible]TS

TABLE OF TIES

CASES **PAGE**

OTHER AUTHORITIES

FLORIDA STATUTES

LAWS OF FLORIDA

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 Michael John Manning was charged with purchase of cocaine within 1,000 feet of a school (R 21). He pled guilty (R 32). His presumptive guidelines sentence was 3½ to 4½ years in prison, with a permitted sentence of 3 to 5½ years (R 28). He filed a motion for downward departure from the guidelines based on Section 397.12, Florida Statutes, alleging that Petitioner was addicted to alcohol and drugs, was under the influence of alcohol when arrested, and was receiving rehabilitative treatment (R 23-27).

The motion to depart downward was granted and Petitioner was placed on probation for 2½ years (R 32). The court entered a written order of departure, stating as grounds that Petitioner was addicted and under the influence of intoxicants at the time of his arrest, that he was impaired and his judgment was severely compromised, that he was in danger of becoming dependent but desired treatment and rehabilitation for his addiction and was amenable to rehabilitation, that Petitioner did not know that he was within 1,000 feet of a school and that school was not in session at the time of his arrest, and that Petitioner had already spent seven months in jail. The order cited section 397.12 of the statutes and case law, including Barbera v. State, 505 So.2d 413 (Fla. 1987) (R 29-31). Special conditions of Petitioner's probation included evaluation for alcohol, drug and psychological rehabilitation; submission to drug and alcohol testing; and continuance in the BARC program (R 32-33).

The state appealed to the Fourth District Court of Appeal. On March 25, 1992 the court reversed the downward departure, but certified the following question to this Court as one of great public importance (copy of opinion in Appendix to this brief):

> 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 opinion cited previous decision of the Fourth District which are now under review by this Court. State v. Liataud, 587 So.2d 1155 (Fla. 4th DCA 1991) (Supreme Court Case No. 78,626); State v. Scates, 585 So.2d 385 (Fla. 4th DCA 1991) (Supreme Court Case No. 78,533); State v. Lane, 582 So.2d 77 (Fla. 4th DCA 1991) (Supreme Court Case No. 78,534).

On March 25, 1992 the state filed notice to invoke discretionary jurisdiction. On April 28, 1992 the state filed a notice of voluntary dismissal. Petitioner then filed an unopposed motion for substitution of parties and for new briefing schedule. By order filed June 8, 1992 this Court granted the state's voluntary dismissal and Mr. Manning's motion for substitution of parties. Mr. Manning was redesignated as Petitioner and the state was redesignated as Respondent.[1]

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[1] After the state's notice of voluntary dismissal was filed, Petitioner filed a notice of intent to invoke discretionary jurisdiction in the district court, which was then forwarded to this Court and assigned Case No. 79,802. Since this notice was not timely, this Court by order filed May 26, 1992 dismissed it, subject to reinstatement if timeliness could be shown. On June 2, 1992 Petitioner filed an unopposed motion for reinstatement. However, after this Court granted substitution of parties under Case No. 79,603, Petitioner filed on June 11, 1992 a notice of voluntary dismissal and of abandonment of motion for reinstatement.

SUMMARY OF ARGUMENT

The trial court was within the authority granted to it by the legislature when it employed Section 397.12, 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).[2]

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

[2] 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; Forrest v. State, Case No. 78,955; and Vola v. State, Case No. 79,455.

> 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 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 21, 32). In its order of departure, the trial court found that Petitioner suffered from substance abuse addiction and was under the influence of intoxicants at the time of his arrest, and that Petitioner did not have full control over his faculties and was impaired to the extent his judgment was severely compromised. The court found that Petitioner was in imminent danger of becoming dependent, but that he desired treatment and rehabilitation and was amenable and capable of rehabilitation (R 29-31).

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 probation for two and a half years, with special conditions that he submit to evaluation for alcohol, drug, and psychological rehabilitation; submit to drug and alcohol testing; and continue in the BARC program (R 32-33).

This disposition was justified in the court's written order. The fact that Petitioner was under the influence and impaired at the time of his arrest was a valid reason for downward departure. Barbera v. State, 505 So.2d 413 (Fla. 1987). Also valid reasons were the trial court's findings that Petitioner was not a threat

to society, that he sincerely desired rehabilitation and treatment, and that he was amendable to rehabilitation. This, too, has been held a sufficient basis for departure. State v. Sachs, 524 So.2d 48 (Fla. 1988).

The question certified in the instant case is the same as that certified in State v. Scates, 585 So.2d 385 (Fla. 4th DCA 1991). The Scates decision relied in part 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.

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 probation. 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, Appellant respectfully requests this Court to reverse the judgment and sentence of the trial court and to remand this cause with proper directions.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished by courier to Joan Fowler, Assistant Attorney General, Elisha Newton Dimick Building, Room 240, 111 Georgia Avenue, West Palm Beach, Florida 33401 this 11th day of June, 1992.

Counsel for Petitioner