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IN THE SUPREME COURT OF FLORIDA

CHUCK ADDERLY,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

Case No. 79,663

PETITIONER'S BRIEF ON THE MERITS

RICHARD L. JORANDBY
Public Defender
15th Judicial Circuit of Florida
Governmental Center/9th Floor
301 North Olive Avenue
West Palm Beach, Florida 33401
(407) 355-2150

ANTHONY CALVELLO
Assistant Public Defender

Counsel for Petitioner

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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 state, 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, Chuck Adderly, was charged by Information filed in the Seventeenth Judicial Circuit with purchase of cocaine at or near a school. See Section 893.13(1)(e), Florida Statutes (1989). On April 18, 1991, Petitioner withdrew his initial plea of not guilty and entered a plea of guilty to purchase of cocaine at or near a school (R 4). Over the objection of the state, the trial court sentenced Petitioner to a downward departure sentence and did not impose a three (3) year mandatory minimum sentence (R 11-14, 25-28). The trial court placed Petitioner on two and one-half (2½) years probation with the special conditions of drug testing and rehabilitation (R 30-31).

The trial judge in the contemporaneous written downward departure order filed in this case sentenced Petitioner alternatively, pursuant to Section 397.12, Fla. Stat. (1989) as follows:

> 6. The Court further finds it is the policy of this State "to provide meaningful alternatives to criminal imprisonment for individuals 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 297.12 (Wests 1989). The evidence in this case indicates that the Defendant purchased two (2) "rocks" of cocaine which was for personal use and not intended for resale or distribution. It has been shown that Defendant is amenable and 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. Defendant is a first time felony offender who scores three and one half (3½) to four and one half (4½) years under the guidelines with a minimum period of incarceration of three (3) calendar years with no gain time. 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 months).
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> (R 26-27).

In imposing the probation, the trial judge expressly ordered that Petitioner submit to evaluation for counseling or placement in a drug program and that he continue to attend narcotics anonymous meetings (R 11, 31). The Respondent-State filed a timely notice of appeal to the Fourth District Court of Appeal.

On direct appeal by Respondent-State, the Fourth District reversed the order of probation citing the three (3) year mandatory minimum set forth in Section 893.13(1)(e). State v. Adderly, 17 F.L.W. D401 (Fla. 4th DCA February 5, 1992). In ruling that the three (3) year mandatory minimum under Section 893.13(1)(e) controlled, the District Court reversed on the authority of the Court's en banc opinion in State v. Jenkins, No. 90-2736 (Fla. 4th DCA Jan. 22, 1992) Appendix 1.

Petitioner filed a motion for rehearing and/or certification on February 14, 1992. On April 1, 1992 citing State v. Scates, 585 So.2d 385 (Fla. 4th DCA 1991) the Fourth District Court of Appeal certified the same question as one of great public importance to this Court in State v. Scates, supra. The certified question is as follows:

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).

See State v. Adderly, 17 F.L.W. D850 (Fla. 4th DCA April 1, 1992) (opinion on rehearing); Appendix 2.

On April 10, 1992, Petitioner filed a Notice of Discretionary Review to this Honorable Court. On April 13, 1992, this Honorable 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 Mr. Adderly's downward departure sentence of two and one-half (2½) years probation must be affirmed. The trial court had full authority and was within its discretionary powers to so sentence Petitioner. Mr. Adderly meets the criteria for application of Section 397.12, Fla. Stat. Specifically, he falls within the classification as a drug dependent amenable to rehabilitation. See (R 26-27). 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 is no language in the statute stating that the mandatory minimum sentence "shall not be suspended, deferred or withheld. In fact, there is no language restricting the trial court's discretion in this regard. Furthermore, the application of the three (3) year mandatory minimum to Mr. Adderly would be cruel and unusual punishment wholly disproportionate to the offense for which Petitioner stands convicted.

ARGUMENT

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

At sentencing, the trial judge found that Petitioner Adderly was a drug dependent amenable to rehabilitation pursuant to Section 397.12, Fla. Stat. (1989) (R 25-27). Following his guilty plea to purchasing cocaine within one thousand feet of a school, Mr. Adderly was placed on two and one-half (2½) years probation instead of the three (3) year mandatory minimum sentence mandated by section 893.13(1)(e), Fla. Stat. (1989).

The trial judge did not abuse his discretion in doing 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, Mr. Adderly 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 Mr. Adderly's original sentence. Third, recent cases have upheld downward departure from the sentencing guidelines where the defendant was, like Mr. Adderly, impaired by substance abuse at the time of the crime and, like Mr. Adderly, amenable to rehabilitation. Finally, the application of the three year mandatory minimum sentence in Petitioner'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

Mr. Adderly, with Section 893.13(1)(e) which imposes the three (3) 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 minimums - a comparison apparently not considered by the Fourth District Court of Appeal - shows that the three year minimum for selling, purchasing, etc., cocaine within 1,000 feet of a school is not as absolute as 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 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. See 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]

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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).

It is clear that the legislature intended to impose a minimum 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 the 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 provides, "...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 make the same provision that 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). Also, 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. However, there is an additional basis upon which the original sentence herein must be upheld.

In this regard, Petitioner disputes the view of the Fourth District in Scates that Section 397.011(2), Fla. Stat. (1989) applies only to simple possession and not to purchase. 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 Scates 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 expressly 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. Consequently, in limiting the sentencer's discretion exclusively to possessory offenses, the Fourth District 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 the trial court did not err in imposing probation upon Petitioner.

Petitioner also established in the lower tribunal that he was a substance abuser, was under the influence at the time of his offense, and was therefore eligible for a downward departure from his permitted guidelines range under Barbera v. State, 505 So.2d 413 (Fla. 1987) and State v. Sachs, 526 So.2d 48 (Fla. 1988). This Court must affirm the trial court's downward departure sentence on this alternative basis. The trial court departed downward on these grounds (R 25-27).

In Barbera v. State, this Court upheld a downward departure where, as in Petitioner's case, substance abuse impaired the defendant's mind at the time of the crime. More recently in State v. Herrin, 568 So.2d 920 (Fla. 1990), this Court stated that substance abuse, coupled with amenability to rehabilitation, could be considered by the sentencer in mitigation. Under criteria set forth in these cases, Petitioner established to the satisfaction of the trial judge his amenability to rehabilitation, his drug

dependency and by testimony showing that his contact with the criminal justice system arose from his drug dependency (R 25-27).

Thus on the authority of Barbera and Herrin, Petitioner's original departure sentence should be affirmed on this alternative basis.

Finally, Petitioner contends that imposition of the three year mandatory minimum sentence would 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 (3½) to four and one-half (4½) years in state prison for Mr. Adderly, an offender without a prior felony record (R 27). 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 (3) year mandatory minimum would constitute cruel and unusual punishment in Mr. Adderly'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.

If this Court does affirm the Fourth District's reversal of Petitioner's original sentence, Petitioner should be afforded an opportunity on remand to withdraw his guilty plea. See State v. Brown, 542 So.2d 1371, 1372 (Fla. 4th DCA 1989) (R 4).

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.

Respectfully Submitted,

RICHARD L. JORANDBY
Public Defender
15th Judicial Circuit of Florida
Governmental Center/9th Floor
301 North Olive Avenue
West Palm Beach, Florida 33401
(407) 355-2150

ANTHONY CALVELLO
Assistant Public Defender
Florida Bar No. 266345

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 16th day of April, 1992.

Counsel for Petitioner