IN THE SUPREME COURT OF FLORIDA

JOHN D. FELTY,

Petitioner,

v.

STATE OF FLORIDA,

Respondent

Case No. 81,517

ACR # 93-120673

ON DISCRETIONARY REVIEW OF
CERTIFIED QUESTION FROM
THE SECOND DISTRICT COURT OF APPEAL
STATE OF FLORIDA

ANSWER BRIEF OF THE RESPONDENT

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STATEMENT OF THE CASE AND FACTS

The charges stem from a fatal accident caused when Felty tried to pass a van driven by Jesse Nieves on the right in a merge lane which ended at a bridge over 34th street on Interstate 4 on the east side of Tampa. Both the Nieves family and Felty and his passenger were returning from the state fair. The three-year-old victim, the Nieves' daughter, was partially thrown from the van and died from massive injuries. Felty drove away from the scene. R16.

The state refiled an information against Felty July 15, 1991, dropping the three charges of fleeing the scene of an accident. R190. This was part of a plea agreement. The refile occurred the same date Felty pled nolo contendere to the single homicide count and the court entered a judgment of guilt. R149-50, R192. The refiled information still contained the allegation that Felty fled the scene contrary to section 316.062, Florida Statutes (1991). R190.

This case engendered a substantial amount of public interest. The trial judge noted that the victim's father, Jesse Nieves, had encouraged many others to correspond with the court regarding the penalty for Felty. R11. The sentencing hearing entails 145 pages of record, indicating this was more than a perfunctory imposition of sentence. R23, R176.

Felty had one prior conviction for DUI. R9. He also had an extensive record of bad driving. R94-95. His mother said his driving problems had arisen only recently, R100-01, but she did have to admonish him to slow down while she was teaching him to drive, R103-04. Although Felty escaped testing for unlawful blood alcohol level because he illegally fled the scene and was found drunk and with a beer in his hand at his apartment three hours later, R30, the trial judge allowed a representative from MADD to address the court. R31-33. Family and

friends of the victim testified about the impact of the death of Alicia Nieves, R12-57, and it's clear that all believed that Felty had been drunk at the time he killed Alicia.

Richard Catalano, the attorney for the Nieves family, told the court Mrs. Nieves may have suffered neurological damage resulting in impaired short term memory, frontal lobe disfunction, and severe depression. R57. He noted Felty's extensive bad and drunk driving history, including a ticket for passing on the right only a month before the same offense caused the fatality at issue here. R59-60.

The investigating officer, Trooper Peterson, testified that Felty was driving at an illegally high rate of speed (conservatively estimated at 65-76 mph, R80) westbound on Interstate 4 at 34th street. R65. It was shortly after 9 p.m. on a Sunday evening, and traffic was moderate to heavy. R65. Felty had been weaving through traffic and went from the far left lane to a the far right lane to pass. The far right lane was a merge lane which was starting to narrow down and merge where Felty entered it. R66. Felty realized he was running out of room and braked, leaving skid marks of 141 feet before he sideswiped a guardrail. A car traveling 55 miles per hour would have stopped in less than 141 feet. R67. Still traveling at a high rate of speed despite the braking and hitting the guard rail, Felty's car impacted the right hand side of the Nieves van, causing it to go out of control and flip over, hitting another van in the left passing lane of I-4. R71-73. Alicia Nieves was ejected from the van during the flip. R74. The Nieves said they heard loud music from Felty's radio before the impact. R84.

Felty continued to drive on, even though his right front tire had been deflated by impact with curbing. R74-75. Felty stopped at the 21st street exit, looked at the damage to his car,

then drove north on 22nd with his lights off. R75. Felty abandoned the car behind a restaurant at Hillsborough and 22nd. R77.

Two troopers went to Felty's address in Clearwater where someone claiming to be his roommate said Felty was not there. As the troopers left, someone in the parking lot said Felty was in the apartment, and the troopers heard voices inside the apartment. They returned, the roommate again denied Felty was there, but Felty came to the door. R78. Felty denied knowledge of any accident, and the troopers left. Three days later, Felty went to a Highway Patrol office and advised that he had been in a collision the night in question. R79. Felty walked right by a Highway Patrol station when he abandoned his car the night of the accident.

Investigators believe Felty had a passenger with him, and the passenger was in the apartment when troopers investigated. However, the passenger was reluctant or refused to comment on Felty's impairment from alcohol that night. R83.

Felty failed to appear for arraignment and capias issued. R185. Felty apparently willfully absented himself or otherwise hid from authorities, as the bail bondsman was forced to request an extension before forfeiture while he tried to track down Felty. R188.

Felty's grandmother testified that she thought the Nieves were to blame for their failure to have their daughter secured in a child car seat. R89.

Felty addressed the court at length. R108-18. He said he had been to a fair the night of the accident, and had been to dinner with a friend as a final celebration before going to school. He was driving home with the friend when the accident occurred. R108. He did not admit to even knowing that he had hit the Nieves' van. In a letter to the judge, he claimed he

was not aware he had struck anything but the bridge railing. R121. He said when he got to his apartment after smashing up his car he had two or three beers and went to bed. R110.

Felty tried to explain away his bad driving record. He admitted the DUI offense, but claimed he didn't fight the charges because his military career in the reserves was jeopardized by the pending charges. R116. His lawyer noted that he had two convictions arising from driving a car, the DUI and a conviction for speeding. R127. Felty talked about getting five traffic tickets in incidents involving his motorcycle, including one where he apparently left the scene illegally. R116. He claimed a traffic ticket he had received for passing on the right in the past was wrong, because he had merely pulled into a right hand lane to go to a gas station. R117. Felty denied that he answered the door of his apartment with a beer in his hand when the police were seeking him. He claimed he was sound asleep in bed. R117-18.

SUMMARY OF THE ARGUMENT

This court's *VanKooten* decision should be read narrowly to prohibit only community control extending beyond the maximum period of incarceration allowed by a guidelines cell calling for incarceration or community control. The facts of that case, and every case cited in that decision, all concerned situations where the defendant received the maximum period of incarceration and had community control imposed beyond that period. In *Ewing*, the First District correctly interpreted *VanKooten* to prohibit only such sentences, leaving trial courts free to mix incarceration and community control up to the maximum period of incarceration allowed within the guidelines cell. The legislature may be deemed to have acquiesced to this interpretation as it did not alter the guidelines language after the *VanKooten* and *Ewing* decisions (although some subsequent decisions from other districts decided contrary to *Ewing*).

Public policy considerations also favor the *Ewing* interpretation. As this court noted in *Skeens*, incarceration, community control and probation are all sentencing options designated by the legislature to meet the varying needs of the courts and the convicted. In a case such as this, the trial judge is free to tailor a sentence which involves all three options, with the goal of gradually easing the offender back into mainstream society by a stepped decrease in the degree of supervision over time. To force the courts to choose between prison or community control can only result in increased prison sentencing where the court believes the offender requires a higher degree of supervision than that offered by probation, and there is no other option available. In the instant case, petitioner could face resentencing up to the full twelve years in prison, rather than the more constructive sentencing scheme originally imposed. The rule

favoring an interpretation more favorable to the offender also requires favoring an interpretation which promises less prison time when community control can be substituted for some but not all of the prison sentence.

ARGUMENT

ISSUE

THE SECOND DISTRICT IN THIS CASE AND THE FIRST DISTRICT IN *COLLINS V. STATE*, 596 SO. 2D 1209 (FLA. 1ST DCA 1992), HAVE CORRECTLY INTERPRETED THIS COURT'S PRECEDENTS.

The state cited and discussed the cases relied upon by the second district in its opinion below in this case. The cogent and concise opinion of that court lays out the rationale for reaching the correct conclusion in this case. The state's comments herein merely attempt to amplify on the decision below to assist this court.

The question boils down to the simple issue of whether this court, in *State v. VanKooten*, 522 So. 2d 830 (Fla. 1988), intended to require departure reasons for a combined sentence of prison and community control which does not exceed the maximum incarcerative period allowed by the guidelines cell. *VanKooten* addressed a trial judge's attempt to impose the maximum term of incarceration allowed in the guidelines cell applicable in that case, 30 months, under the guidelines provision of "community control or twelve to thirty months incarceration," followed by an *additional* full two years of community control followed by ten and one-half years of probation. *VanKooten v. State*, 512 So. 2d 214 (Fla. 5th DCA 1987).

Every case cited and discussed in this court's decision in *VanKooten* involved imposition of community control after a maximum period of incarceration. *VanKooten* (5th DCA decision); *Hankey v. State*, 505 So. 2d 701 (Fla. 5th DCA 1987); *Francis v. State*, 487 So. 2d 348 (Fla. 2d DCA), *review denied*, 492 So. 2d 1332 (Fla. 1986) (disapproved in this court's *VanKooten* decision for allowing community control after 30 months of incarceration). Clearly, the issue

before this court in *VanKooten* was the imposition of community control beyond 30 months of incarceration. This court reached the rather obvious conclusion that the guidelines framers intended to prevent the trial court from imposing community control beyond the maximum incarcerative period of 30 months.

The framers of the guidelines must have believed this specific exclusion was necessary to prevent the imposition of a split sentence under section 948.01(6), Florida Statutes, wherein the trial court would normally be free to impose a prison sentence up to the limit of the guidelines cell, i.e. 30 months, followed by probation or community control up to the statutory maximum. This court by its rules and the legislature by its statutes were thus making a special exception to the general rule of split sentence, apparently in the belief that one who is subjected to the full incarcerative burden of 30 months (or whatever maximum incarcerative period is allowed in a cell permitting incarceration or community control) has done enough time.

Unfortunately, this court spoke in terms so general that confusion arose from the decision. However, the legislature may be deemed to have properly interpreted the decision to have been limited solely to the denial of a split sentence exceeding 30 months, since it not only did nothing after *VanKooten*, but also did nothing after *Ewing v. State*, 526 So. 2d 1029 (Fla. 1st DCA 1988). It is the lack of action by the legislature in light of the *Ewing* decision which compels the conclusion that *VanKooten* is limited to the construction urged supra. *Ewing* rationalized *VanKooten* and limited its effect to community control beyond the maximum period of incarceration allowed by the particular guidelines cell. Thus, *Ewing* prevented a possibly overbroad interpretation of *VanKooten*, rather than disagreeing with it.

Had the legislature intended the interpretation urged by petitioner herein, *Ewing* should have been the mechanism to trigger corrective action by the legislature. A rational legislature, however, would look at *VanKooten* and *Ewing* and conclude that the courts of this state had reached the correct conclusion--a combined sentence of incarceration and community control up to 30 months is allowed by Florida Rule of Criminal Procedure 3.701(d)(13) (see also the Commission Notes to the 1988 Amendments regarding subsection (d)(13)), but a split sentence greater than this is not allowed.

Unfortunately, some courts have construed *VanKooten* to prohibit a combined sentence of incarceration and community control within the guidelines maximum incarcerative period. *Phelps v. State*, 583 So. 2d 1120 (Fla. 5th DCA 1991); *Harmon v. State*, 599 So. 2d 754 (Fla. 4th DCA 1992).

The state urges that *Ewing* and *Collins v. State*, 596 So. 2d 1209 (Fla. 1st DCA 1992), offer the more rational interpretation of the guidelines. As this court noted in *Skeens v. State*, 556 So. 2d 1113, 1113 (Fla. 1990), "Probation, community control, and incarceration are alternative options that the legislature has made available to meet the broad spectrum of sentencing needs." It simply makes no sense to allow community control to substitute for incarceration in all other contexts except that at issue here.

Petitioner's complaint that *Oglesby v. State*, 584 So. 2d 93 (Fla. 1st DCA 1991), shows up an anomaly created by the *Ewing/Collins* interpretation ignores the dissent in *Oglesby*. Judge Wolf noted that the defendant in that case could have been sentenced to three and one-half years incarceration, community control and incarceration up to the 3½ year maximum, or one day less than a year in jail as a condition of community control (citing to *Tillman v. State*, 555 So. 2d

940 (Fla. 5th DCA 1990)). All of those options were more severe than the sentence imposed in *Oglesby*, one day less than a year as a separate sentence, followed by community control. Judge Wolf argued that since the obviously legitimate sentences were more severe, "Common sense dictates that the sentence imposed in the instant case did not constitute a departure." 584 So. 2d at 95 (Wolf, J., dissenting in part).

If the rule is to construe the guidelines most favorably to the defendant, then the rule should be construed in this case to allow the defendant to serve some portion of his incarcerative period on community control, an obviously preferred alternative to doing the entire period in prison. This sentencing option is all the more critical considering the prison crowing problems currently confronting the state. The hypertechnical interpretation of the guidelines urged by petitioner can only result in a burden on defendants and upon the prison system, with the loss of the option of community control as part of a sentence maximum period of incarceration under the guidelines where the range includes the unfortunate "or." Common sense and logic dictate the conclusion that neither this court nor the legislature intended to unduly constrain trial judges from using a valuable sentencing option in cases such as the one sub judice.

Now is the time for this court to clarify the course of this particular sidestream of the sentencing guidelines. The state might be more than happy to oblige the instant appellant with his full dose of incarceration, if that is the option he truly desires. However, the trial judge attempted to fashion a sentence in this case which recognized the potential for rehabilitation, combining incarceration with community control and probation to gradually ease the restrictions on petitioner in hopes that he could shoulder increasing responsibility for his life and return to a more productive lifestyle. Appellate counsel for petitioner appears to be attempting to thwart

this scheme by compelling the judge to administer more incarcerative time by arguing that the community control aspect of the sentence cannot be imposed. The only relief is to leave the trial court free to impose the full ten years as incarcerative punishment, as this would be a nondeparture sentence.

Of course, this court could also remand with leave to reimpose the community control if valid reasons for departure could be given. The question then becomes, must the trial court justify upward or downward departure? If the anomaly of *Oglesby* justifies making community control a departure sentence, then this court will have merely substituted one anomaly for another. This is, of course, absurd, and only serves to illustrate the lack of common sense inhering in a position which maintains that the instant split sentence is not permitted.

CONCLUSION

This court should approve the decision below.

Respectfully submitted,

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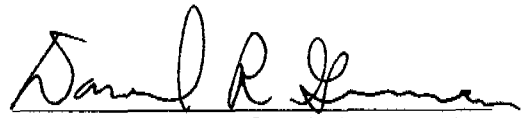
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to Deborah K. Brueckheimer, Assistant Public Defender, Public Defender's Office, Polk County Courthouse, P.O. Box 9000--Drawer PD, Bartow, Florida 33830, this date, May 12, 1993.



OF COUNSEL FOR APPELLEE