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IN THE SUPREME COURT OF FLORIDA

JOHN D. FELTY, :

Petitioner, :

vs. : Case No. 81,517

STATE OF FLORIDA, :

Respondent. :

_____:

DISCRETIONARY REVIEW OF DECISION OF THE
DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

INITIAL BRIEF OF PETITIONER ON THE MERITS

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TENTH JUDICIAL CIRCUIT

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STATEMENT OF THE CASE AND FACTS

On April 30, 1991, the State Attorney for the Thirteenth Judicial Circuit in and for Hillsborough County, Florida, filed an information charging the Appellant, JOHN D. FELTY, with the following: vehicular homicide in violation of section 782.017, Florida Statutes (1989); and three counts of leaving the scene of an accident with injury or death in violation of section 316.027, Florida Statutes (1989) (R181-183). On July 15, 1991, the State filed a supersedeas information with only one count of vehicular homicide charged under section 782.071(2), Florida Statutes (1989). The offense was alleged to have occurred on February 17, 1991 (R190,191). On that same date Mr. Felty entered a plea of no contest. There was no agreement as to the sentence (R147-159). Sentencing took place on August 22, 1991. The trial court imposed 8 1/2 years prison to be followed by 1 1/2 years community control to be followed by 5 years probation. Credit for 11 days served was given. The guidelines recommended 3 to 7 years prison with a permitted range of community control to 12 years prison (R1-146, 192-199, 201-206). Mr. Felty timely filed a pro se notice of Appeal on September 23, 1991 (R209).

On Appeal the Second District Court of Appeal upheld Mr. Felty's sentence but certified the following question:

> WHERE A DEFENDANT SCORES IN A PERMITTED RANGE OF COMMUNITY CONTROL OR INCARCERATION, MAY THE DEFENDANT BE SENTENCED TO A COMBINATION OF COMMUNITY CONTROL AND INCARCERATION SO LONG AS THE LENGTH OF THE TOTAL COMBINED SENTENCE OF INCARCERATION AND COMMUNITY CONTROL DOES NOT

EXCEED THE MAXIMUM GUIDELINES INCARCERATIVE SENTENCE PERMITTED?

SUMMARY OF THE ARGUMENT

The trial court erred in sentencing Mr. Felty when it imposed community control in addition to prison time. This sentence constitutes a guidelines departure sentence, but no reasons for a departure were given. This Court's prior decision in Van Kooten v. State, 522 So. 2d 830 (Fla. 1988), has not been implicitly overruled and must still be adhered to.

ARGUMENT

ISSUE I

WHETHER A COMBINATION OF PRISON INCARCERATION AND COMMUNITY CONTROL IS A DEPARTURE FROM THE GUIDELINES EVEN THOUGH THE TOTAL SENTENCE OF INCARCERATION AND COMMUNITY CONTROL DOES NOT EXCEED THE GUIDELINES RANGE?

The guidelines permitted range in this case was community control to 12 years of prison. The trial court imposed 8 1/2 years prison to be followed by community control to be followed by probation. This Court in Van Kooten held that when the permitted range includes community control, a combination of community control with prison time constitutes a guidelines departure sentence and requires written reasons for such a departure. Also see Phelps v. State, 583 So. 2d 1120 (Fla. 5th DCA 1991); Harmon v. State, 599 So. 2d 754 (Fla. 4th DCA 1992); and cases cited therein. This Court's decision in Van Kooten makes Mr. Felty's sentence an invalid sentence under the guidelines.

The First District Court of Appeal carved out an exception to the Van Kooten case (which the Second District Court of Appeal adopted in Mr. Felty's case) that finds Van Kooten inapplicable as long as the combined periods of prison incarceration and community control do not exceed the guidelines range. This exception, however, ignores this Court's clear holding that the use of the word "or" for the cell of community control or 12 to 30 months incarceration does not allow for the imposition of both

community control and prison incarceration. As aptly pointed out by Judge Ervin in his dissent in Ewing v. State, 526 So. 2d 1029 at 1031 (Fla. 1st DCA 1988):

> The Florida Supreme Court's opinion in State v. Van Kooten, 522 So. 2d 830 (Fla. 1988), is, in my judgment, directly controlling and requires that the sentence in the present case be vacated. Although the sentence combining incarceration and community control in Van Kooten--unlike the sentence at bar--exceeded the recommended guideline range, such circumstance was not the basis of the Van Kooten decision, holding that a sentence subjecting a defendant to a combination of both community control and incarceration represents a departure from the sentencing guidelines, which is improper in the absence of any valid reasons supporting such departure. I don't see how the Florida Supreme Court's language in Van Kooten can be any more definitively set forth than the following:
>
> > The guideline clearly states that the appropriate sentence was community control or incarceration. Any change in that presumptive guideline must occur through appropriate legislative and court rule action, rather than by judicial construction.
>
> 522 So.2d at 831 (e.s.). As in Van Kooten, I would vacate the sentences imposed and remand for resentencing.

This Court clearly based the Van Kooten decision on the word "or"; and this conclusion is supported by the rule of construction requiring criminal statutes to be strictly construed in favor of the defendant. § 775.021(1), Fla. Stat. (1991).

This Court's decision in Skeens v. State, 556 So. 2d 1113 (Fla. 1990), does not affect this Court's Van Kooten decision. Skeens addressed the stacking of probation on community control and found it permissible. This Court's general statement in Skeens that probation, community control, and incarceration are alterna-

tive options that the legislature has provided is nothing more than a general statement. This kind of dicta does not address specific legislation that has clearly set forth community control or incarceration as opposed to community control and/or incarceration. If the legislature sets forth such a specific form of sentence, alternatives are no longer an option.

It is important to note that the exception the First District Court of Appeal carved out of Van Kooten in Ewing has created an "anomaly" in that the First District Court of Appeal has held that prison plus community control is not a guidelines departure as long as it is within the guidelines range, but community control plus county jail is a guidelines departure requiring written reasons. Oglesby v. State, 584 So. 2d 93 at 94 (Fla. 1st DCA 1991). Thus, the First District Court of Appeal's reasoning has led them to the interesting conclusion that state prison followed by community control is a valid guidelines sentence while the less severe sanction of jail plus community control is not a valid guidelines sentence but a departure requiring written reasons. This "anomaly" is further evidence of how the First District Court of Appeal's logic in Ewing/Collins v. State, 596 So. 2d 1209 (Fla. 1st DCA 1992), is flawed and should not be acceptable to this Court.

CONCLUSION

Based on this Court's decision in Van Kooten, the certified question submitted by the Second District Court of Appeal should be answered in the negative and Mr. Felty's case remanded for resentencing.

APPENDIX

PAGE NO.

1. Second District Court of Appeal Opinon filed March 17, 1993. A1

FP file

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

JOHN D. FELTY,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

CASE NO. 91-03133

Opinion filed March 17, 1993.

Appeal from the Circuit Court for Hillsborough County; Edward H. Ward, Judge.

James Marion Moorman, Public Defender, and Deborah K. Brueckheimer, Assistant Public Defender, Bartow, for Appellant.

Robert A. Butterworth, Attorney General, Tallahassee, and David R. Gemmer, Assistant Attorney General, Tampa, for Appellee.

CAMPBELL, Judge.

Appellant, convicted of the vehicular homicide of a little girl, argues that the court erred in sentencing him. First, he argues that the court improperly departed from the guidelines without giving written reasons; and second, he

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maintains that the court improperly imposed special terms and conditions of probation without orally announcing them at the sentencing hearing. We disagree with appellant on his first issue and affirm the sentences imposed. We agree with appellant on his second issue and remand with instructions to strike the special liens and conditions of probation at issue.

The first question is whether appellant's sentence amounts to a departure. Appellant's scoresheet placed him in the permitted range of community control or one to twelve years incarceration. Appellant argues that the court improperly departed from the guidelines without written reasons when, despite the guidelines' recommendation of incarceration or community control, the court sentenced him to both incarceration and community control. There are two lines of thought in this area, the first of which is that pressed by appellant.

Under appellant's preferred approach, when a defendant scores in a permitted range that includes community control or a prison term, the use of the word "or" was intended to make the alternatives mutually exclusive with the result that community control cannot be combined with prison time in any circumstance even if the total time does not exceed the maximum permitted range (the VanKooten rule). State v. VanKooten, 522 So. 2d 830 (Fla. 1988); Harmon v. State, 599 So. 2d 754 (Fla. 4th DCA 1992); Phelps v. State, 583 So. 2d 1120 (Fla. 5th DCA 1991).

The second approach holds that the above VanKooten rule applies only where the combined sentences exceed the maximum

period of incarceration permitted under the guidelines, reasoning that there is no departure unless the combined sanctions exceed the maximum guidelines incarcerative period (the Collins rule). Collins v. State, 596 So. 2d 1209 (Fla. 1st DCA 1992); Ewing v. State, 526 So. 2d 1029 (Fla. 1st DCA 1988). Appellant was sentenced to eight-and-one-half years in prison followed by one-and-one-half years community control, followed by five years probation, for a total of fifteen years. The maximum sentence permitted by law for vehicular homicide where the defendant fails to stop at the scene, as here, is fifteen years. §§ 775.082, 782.071(2), Fla. Stat. (1991).

Thus, the VanKooten approach would require us to reverse appellant's sentence since it combines community control and incarceration and is, therefore, an improper departure without written reasons. Under the Collins approach, however, appellant's sentence would be proper since the total term imposed for incarceration and community control is ten years, which is well within the maximum guidelines incarcerative sentence of fifteen years. The five-year probationary term does not change this result since the combined incarcerative and probationary periods do not exceed the maximum term permitted by law. See Comm. Note to Fla. R. Crim. P. 3.701(d)(12).

We are inclined to follow the Collins approach and, accordingly, find that appellant's sentence is not an improper departure. Our decision in this regard is bolstered by our belief that the Florida Supreme Court in Skeens v. State, 556 So.

2d 1113 (Fla. 1990), may have overturned the VanKooten rule as follows:

> Skeens argues that stacking is improper because the clear legislative intent underlying chapters 921 and 948 is that community control and probation are alternative sentencing dispositions that cannot be imposed in tandem. We disagree. Probation, community control, and incarceration are alternative options that the legislature has made available to meet the broad spectrum of sentencing needs. Each involves different procedures and restrictions. We see no reason why probation and community control cannot be stacked to meet individualized sentencing circumstances. In 1985, this Court amended the committee note following Florida Rule of Criminal Procedure 3.701(d)(13) to provide in part: "It is appropriate to impose a sentence of community control to be followed by a term of probation. The total sanction (community control and probation) shall not exceed the term provided by general law." The Florida Bar Re: Rules of Criminal Procedure, 482 So. 2d 311, 317 (Fla. (1985).

556 So. 2d at 1113-1114 (emphasis omitted).

Although we believe that this language may have overturned VanKooten, we are not certain. Accordingly, while we affirm the imposition of community control and incarceration under Collins, because the VanKooten rule has not expressly been overruled, we certify to the Florida Supreme Court the following question:

> WHERE A DEFENDANT SCORES IN A PERMITTED RANGE OF COMMUNITY CONTROL OR INCARCERATION, MAY THE

DEFENDANT BE SENTENCED TO A COMBINATION OF COMMUNITY CONTROL AND INCARCERATION SO LONG AS THE LENGTH OF THE TOTAL COMBINED SENTENCE OF INCARCERATION AND COMMUNITY CONTROL DOES NOT EXCEED THE MAXIMUM GUIDELINES INCARCERATIVE SENTENCE PERMITTED?

Turning to appellant's second sentencing error, appellant contends that the special conditions of probation related to alcohol consumption were not orally announced at sentencing and must be stricken under Tillman v. State, 592 So. 2d 767 (Fla. 2d DCA 1992). The state argues that appellant's failure to object at the trial level precludes him from challenging these conditions on appeal.

We recently announced that "[s]o long as the oral pronouncement is sufficient to place the defendant on notice of the general substance of each special condition and gives the defendant the opportunity to object, the minimum requirements of due process are satisfied." Olvey v. State, 609 So. 2d 640, 643 (Fla. 2d DCA 1992).

At sentencing, the court here did not mention the special conditions of probation with the result that we must reverse and remand for correction to reflect only those conditions orally pronounced at sentencing or those allowed by statute.

DANAHY, A.C.J., and THREADGILL, J., Concur.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to David R. Gemmer, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4730, on this 29th day of April, 1993.

Respectfully submitted,

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