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IN THE SUPREME COURT OF FLORIDA

CLERK, SUPREME COURT.

By _____
Chief Deputy Clerk

ANN BRANCH,)
)
Petitioner,)
)
vs.)
)
STATE OF FLORIDA,)
)
Respondent.)
_____)

CASE NO. 81536
Fourth DCA Case No.: 91-1024

PETITIONER'S BRIEF ON JURISDICTION

RICHARD L. JORANDBY
Public Defender
15th Judicial Circuit
Criminal Justice Building
421 Third Street/6th Floor
West Palm Beach, Florida 33401
(407) 355-7600

ROBERT FRIEDMAN
Assistant Public Defender
Florida Bar No. 500674

Attorney for Ann Branch

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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 District Court of Appeal, Fourth District. Respondent was the prosecution and appellant in the lower courts. In this brief, the parties will be referred to as they appear before this Court.

The symbol "A" will denote appendix.

STATEMENT OF THE CASE AND FACTS

On December 11, 1991, the Fourth District Court of Appeal reversed the trial court's downward departure sentence on the authority of State v. Baxter, 581 So. 2d 939 (Fla. 4th DCA 1991)¹ and State v. Jenkins, 591 So. 2d 261 (Fla. 4th DCA 1991)² (A1).

On December 12, 1991 Petitioner filed a motion for rehearing and certification to the Florida Supreme Court. On January 17, 1992, the Fourth District stayed the case pending a decision from this Court on an identical certified question contained in State v. Scates, 585 So. 2d 385 (Fla. 4th DCA 1991) (A2). On July 23, 1992 this Court answered the certified question in Scates in the affirmative and quashed the opinion of the district court. Scates v. State, 603 So. 2d 504 (Fla. 1992) (A3-A6). On March 1, 1993 the Fourth District Court of Appeal denied Petitioner's motion for rehearing (A7).

Petitioner timely filed a notice to invoke this Court's discretionary jurisdiction.

¹ Baxter was vacated on other grounds in Baxter v. Letts, 592 So. 2d 1089 (Fla. 1992) and disapproved in Scates v. State, 603 So. 2d 504 (Fla. 1992).

² Jenkins was quashed by this Court in Jenkins v. State, 603 So. 2d 509 (Fla. 1992).

SUMMARY OF THE ARGUMENT

The decision, at bar, expressly and directly conflicts with this Court's decision in Scates v. State, 603 So. 2d 504 (Fla 1992). Thus, Petitioner has properly invoked the conflict jurisdiction of this Court.

ARGUMENT

PETITIONER HAS PROPERLY INVOKED THE JURISDICTION OF THIS COURT SINCE THE OPINION OF THE FOURTH DISTRICT COURT OF APPEAL EXPRESSLY AND DIRECTLY CONFLICTS WITH A DECISION OF THIS COURT

To properly invoke the "conflict certiorari" jurisdiction of this Court, Petitioner must demonstrate that there is "express and direct conflict" between the decision challenged herein, and those holdings of other Florida appellate courts or this Court on the same rule of law to produce a different result than other state appellate courts faced with the substantially same facts. Dodi Publishing v. Editorial America, S.A., 385 So. 2d 1369 (Fla. 1980); Jenkins v. State, 385 So. 2d 1356 (Fla. 1980); Article v, § 3(b)(3), Fla. Const. (1980); Fla.R.APP.P. 9.030 (a) (2) (iv).

In the present case, the opinion of the Fourth District Court of Appeal expressly and directly conflicts with this Court's decision in Scates v. State, 603 So. 2d 5034 (Fla. 1992); see also, Jenkins v. State, 603 So. 2d 509 (Fla. 1992); Lane v. State, 603 So. 2d 510 (Fla. 1992). In Scates, this Court held that a trial judge may refer a defendant convicted under Florida Statute 893.13 (1)(e)(1) (1989) to a drug abuse program pursuant to Florida Statute 397.12 (1989) rather than impose a mandatory minimum three year sentence.

The opinion by this Court in Scates is expressly and directly in conflict with the Fourth District herein on the same question of law. Thus, the Branch opinion expressly and directly conflicts with a decision of this Court. Petitioner has validly invoked the

conflict jurisdiction of this Court in the instant case.

Petitioner respectfully requests this Honorable Court to grant her petitioner for review and reverse the decision of the lower court.

CONCLUSION

The decision of the Fourth District Court of Appeal herein expressly and directly conflicts with a decision of this Court on the same question of law. This Honorable Court should grant Petitioner's request for jurisdiction and hear this cause on the merits.

Respectfully submitted,

RICHARD JORANDBY
Public Defender
15th Judicial Circuit of Florida
Criminal Justice Building
421 Third Street\6th Floor
West Palm Beach, Florida 33401
(407) 355-7600



ROBERT FRIEDMAN
Assistant Public Defender
Bar No.: 500674

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to Michelle A. Smith, Assistant Attorney General, 1655 Palm Beach Lakes Blvd, Third Street, West Palm Beach, Florida 33401 by courier this 2 day of APRIL, 1993.



Attorney for Ann Branch

IN THE SUPREME COURT OF FLORIDA

ANN BRANCH,)
)
 Petitioner,)
)
vs.))
))
STATE OF FLORIDA,)
)
 Respondent.)
_____)

CASE NO.
Fourth DCA Case No.: 91-1024

APPENDIX

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

JULY TERM 1991

STATE OF FLORIDA,)
)
 Appellant,)
)
 v.) CASE NO. 91-1024.
)
 ANN BRANCH,)
)
 Appellee.)
 _____)

Opinion filed December 11, 1991

Appeal from the circuit Court
for Broward County; Robert W.
Tyson, Jr., Judge.

Robert A. Butterworth, Attorney
General, Tallahassee, and Michelle
A. Smith, Assistant Attorney General,
West Palm Beach, for appellant.

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

Richard L. Jorandby, Public Defender,
and Robert Friedman, Assistant Public
Defender, West Palm Beach, for appellee.

PER CURIAM.

REVERSED on authority of State v. Baxter, 581 So.2d
939 (Fla. 4th DCA 1991); State v. Jenkins, 16 F.L.W. 2628 (4th
DCA Oct. 9, 1991).

DOWNEY, HERSEY and DELL, JJ., concur.

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT, P.O. BOX A, WEST PALM BEACH, FL 33402

STATE OF FLORIDA

CASE NO. 91-01024

Appellant(s),

vs.

ANN BRANCH

L.T. CASE NO 90-17287 CF
BROWARD

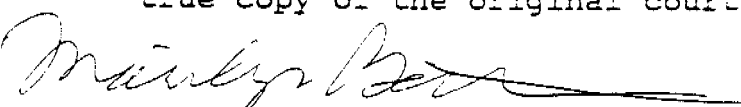
Appellee(s).

January 17, 1992

BY ORDER OF THE COURT:

ORDERED that this case is stayed in this court pending a decision in the following cases, or either of them, deciding the certified question therein contained which will suffice to resolve the question present herein: State v. Jenkins, 16 F.L.W. 2628 (Fla. 4th DCA Oct. 9, 1991); State v. Scates, 585 So.2d 385 (Fla. 4th DCA 1991); or State v. Lane, 582 So.2d 77 (Fla. 4th DCA 1991).

I hereby certify the foregoing is a true copy of the original court order.


MARILYN BEUTTENMULLER
CLERK.

cc: Attorney General-W. Palm Beach
Public Defender 15
Robert E. Lockwood, Clerk

/CH

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PUBLIC DEFENDERS OFFICE
APPELLATE DIVISION
15th JUDICIAL CIRCUIT

RF

tice from the date of this opinion and shall take all necessary steps to protect the interests of any present Florida clients. Judgment for costs in the amount of \$574.00 is entered against Nedick, for which sum let execution issue.

It is so ordered.

BARKETT, C.J., and OVERTON,
SHAW, GRIMES, KOGAN and
HARDING, J.J., concur.

McDONALD, J., concurs in part and
dissents in part with an opinion.

McDONALD, Justice, concurring in part,
dissenting in part.

I would approve the referee's recommendation of three years suspension with the specified conditions for reinstatement as the appropriate penalty in this case.



Carrick A. SCATES, Petitioner.

v.

STATE of Florida, Respondent.

No. 78523.

Supreme Court of Florida.

July 29, 1992.

Defendant was convicted in the Circuit Court, Broward County, of purchasing cocaine within 1000 feet of school, and was sentenced to two years probation. State appealed. The District Court of Appeal, 585 So.2d 385, reversed and remanded, and certified question. The Supreme Court held that court was not required to impose minimum three-year sentence on defendant, but rather, could refer him to drug abuse program.

Certified question answered, opinion quashed.

Grimes, J., issued dissenting opinion in which McDonald and Harding, J.J., concurred.

1. Drugs and Narcotics ⇨133

Statute providing for minimum term of imprisonment of three calendar years for individuals convicted of manufacturing, selling, delivering, or purchasing cocaine within 1000 feet of school is intended to create drug-free zone around Florida's schools. West's F.S.A. § 893.13(1)(e)1.

2. Statutes ⇨241(1)

Where criminal statutes are susceptible to differing constructions, they must be construed in favor of accused. West's F.S.A. § 775.021.

3. Statutes ⇨223.2

In general, statutes relating to same subject and having same purpose should be construed consistently.

4. Chemical Dependents ⇨12

Drugs and Narcotics ⇨133

With respect to defendant convicted of manufacturing, selling, delivering or purchasing cocaine within 1000 feet of school, court is not required to impose minimum three-year sentence, but rather, may refer defendant to drug abuse program. West's F.S.A. §§ 397.12, 893.13(1)(e).

Norliza Batts of the Law Offices of Norliza Batts, P.A., Fort Lauderdale, for petitioner.

Robert A. Butterworth, Atty. Gen., Joan Fowler, Bureau Chief, Asst. Atty. Gen., and Dawn S. Wynn, Asst. Atty. Gen., West Palm Beach, for respondent.

PER CURIAM.

We review *State v. Scates*, 585 So.2d 385, 386 (Fla. 4th DCA1991), in which the court certified the following question as being of great public importance:

MAY A TRIAL COURT PROPERLY DEPART FROM THE MINIMUM MANDATORY PROVISIONS OF SECTION 893.13(1)(e), FLORIDA STATUTES (1989), UNDER THE AUTHORITY OF

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SCATES v. STATE

Fla. 505

Cite as 603 So.2d 504 (Fla. 1992)

THE DRUG REHABILITATION PROVISIONS OF SECTION 397.12, FLORIDA STATUTES (1989)?

We have jurisdiction pursuant to article V, section 3(b)(4) of the Florida Constitution.

Scates pled guilty to purchasing one rock of cocaine from an undercover sheriff's deputy within 1000 feet of a school in violation of section 893.13(1)(e)(1), Florida Statutes (1989). The trial court found that Scates had purchased the cocaine for personal use, suffered from substance abuse addictions and was under the influence of alcohol at the time of his arrest. The court found that he was amenable to meaningful rehabilitation and that there was a reasonable possibility that drug treatment would be successful. The court placed Scates on two years' probation and ordered him to undergo drug rehabilitation pursuant to section 397.12, Florida Statutes (1989).¹ The Fourth District Court of Appeal reversed on the premise that section 893.13(1)(e)(1) required the imposition of a minimum mandatory sentence of three years. *Accord State v. Lane*, 582 So.2d 77 (Fla. 4th DCA1991); *State v. Baxter*, 581 So.2d 937 (Fla. 4th DCA1991), *vacated on other grounds*, *Baxter v. Letts*, 592 So.2d 1089 (Fla.1992); *State v. Liataud*, 587 So.2d 1155 (Fla. 4th DCA1991), *review granted*, 593 So.2d 1052 (Fla.1992).

[1] Section 893.13(1)(e)(1) provides that individuals convicted of manufacturing, selling, delivering, or purchasing cocaine within 1000 feet of a school "shall be sentenced to a minimum term of imprisonment of 3 calendar years." The statute is intended to create a drug-free zone around Florida's schools. *State v. Burch*, 545 So.2d 279, 281 (Fla. 4th DCA1989), *approved*, 558 So.2d 1 (Fla.1990).

On the other hand, in enacting chapter 397, the legislature intended "to provide a meaningful alternative to criminal imprisonment for individuals capable of rehabilitation ... through techniques and programs not generally available in state or federal prison systems" and "to encourage

1. The State does not argue that the court improperly departed from the three-and-a-half- to four-and-a-half-year sentence called for by the

trial judges to use their discretion to refer persons charged with, or convicted of, violation of laws relating to drug abuse ... to a state-licensed drug rehabilitation program in lieu of, or in addition to, imposition of criminal penalties." § 397.10, Fla.Stat. (1989). Section 397.12 provides:

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 licensed by the department [of Health and Rehabilitative Services].... 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.

We have the problem of reconciling the requirement of section 893.13(1)(e)(1) to impose a three-year sentence with the mandate of section 397.12 to find alternatives to prison for violations of chapter 893 where such alternatives would be more beneficial.

[2] In construing these statutes, we begin with the principle that, where criminal statutes are susceptible to differing constructions, they must be construed in favor of the accused. *See* § 775.021, Fla.Stat. (1989); *Lambert v. State*, 545 So.2d 838, 841 (Fla.1989). On its face, section 397.12 applies to chapter 893, and this application is not limited by any other provision of chapter 397. Also, while section 893.13(1)(e) does call for a minimum three-year sentence, when read in conjunction with the other sentencing provisions of chapter 893, it does not absolutely preclude trial judges from exercising their discretion to reduce the sentence.

Two other sections in chapter 893 contain mandatory minimum sentences. Sections 893.135 and 893.20, Florida Statutes (1989), provide that the minimum sentences contained therein shall "not be suspended, de-

sentencing guidelines. *See Herrin v. State*, 568 So.2d 920 (Fla.1990).

ferred, or withheld." Also, sections 893.135 and 893.20 expressly refer to their sentences as "mandatory." There is no similar restriction in section 893.13(1)(e), and the word mandatory is not used. The omission of this language implies that the legislature intended a different construction, allowing trial judges greater discretion in sentencing decisions under section 893.13(1)(e).²

Scates was convicted of purchasing a small amount of cocaine for personal use. The State argues that section 397.12 cannot apply here because it only relates to possession. See § 397.011(2), Fla.Stat. (1989); § 893.15, Fla.Stat. (1989) (expressly providing that chapter 397 is an alternative to sentencing under sections 893.13(1)(f) and (1)(g) (applying to possession of drugs)). We disagree. Section 397.12 does not limit itself to possessory offenses under chapter 893. Section 397.10 manifests the intent to help drug addicts without incarcerating them. For purposes of section 397.12, we fail to see any difference between possessing cocaine for personal use and purchasing a small amount of cocaine for personal use.

[3] The State also cites the rule that when construing two competing statutes, the later promulgated statute should prevail as the last expression of the legislature's intent. Thus, the minimum mandatory sentence in section 893.13(1)(e) should prevail because that statute was enacted after section 397.12. This rule, however, is not applicable here because we do not view these statutes as conflicting. In general, statutes relating to the same subject and having the same purpose should be construed consistently. *Wakulla County v. Davis*, 395 So.2d 540, 542 (Fla.1981). The purpose of the statutes at bar is to combat drugs. Their punishment provisions are alternatives to be applied by trial judges according to the facts of each case. Section 397.12 was clearly intended to apply to defendants in Scates' position.

2. *State v. Ross*, 447 So.2d 1360 (Fla. 4th DCA), review denied, 456 So.2d 1182 (1984), relied on by the court below in its opinion, is distinguish-

[4] In the instant case, Scates was a first-time offender who purchased cocaine for personal use. He is not a dealer or manufacturer. The trial court expressly found that Scates was capable of and amenable to rehabilitation. Chapter 397 was promulgated to give individuals who have a problem with drugs an opportunity to become productive members of society. Scates is the type of defendant contemplated by the rehabilitation alternative of section 397.12. In this case, application of a mandatory minimum sentence would not further the legislative goal of providing alternatives to incarceration for drug addicts with a chance at meaningful rehabilitation.

Accordingly, we hold that trial judges may refer a defendant convicted under section 893.13(1)(e)(1) to a drug abuse program pursuant to section 397.12 rather than impose a minimum three-year sentence. We answer the certified question in the affirmative. We disapprove of *State v. Lane*, *State v. Baxter*, and *State v. Liataud* and quash the opinion below.

It is so ordered.

BARKETT, C.J., and OVERTON, SHAW and KOGAN, JJ., concur.

GRIMES, J., dissents with an opinion, in which McDONALD and HARDING, JJ., concur.

GRIMES, Justice, dissenting.

I am generally opposed to mandatory minimum sentences because they deprive trial judges of the discretion to deal more leniently in genuine hardship cases. This may be such a case. However, it is the legislature, rather than the courts, which has the authority to decide whether there shall be a mandatory minimum sentence. In this case, the legislature has spoken.

Section 397.12, Florida Statutes (1989), authorizing the referral of those convicted of a violation of chapter 893 to a drug treatment program, was enacted in 1973 at a time when mandatory minimum sen-

able on the same basis and also because that case did not involve a conviction under chapter 893.

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LIATAUD v. STATE

Fla. 507

Cite as 603 So.2d 507 (Fla. 1992)

tences were unknown except in capital cases. Ch. 73-75, Laws of Fla. In 1987, the legislature first passed section 893.13(1)(e), specifically prohibiting the commission of drug crimes within 1000 feet of a school. Ch. 87-243, Laws of Fla. Two years later, section 893.13(1)(e) was amended to provide that violators, with respect to certain controlled substances (including cocaine) "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." Ch. 89-524, § 1, Laws of Fla. While the statute could have used the word "mandatory" and could have provided that the sentence not be "suspended, deferred or withheld," can there be any doubt what the legislature intended?

The accepted rules of statutory construction all lead to the same conclusion. Section 397.12 and section 893.13(1)(e)(1) are in facial conflict. Therefore, the later statute, which is section 893.13(1)(e), should prevail as the last expression of legislative will. *Askew v. Schuster*, 331 So.2d 297, 300 (Fla.1976); *Johnson v. State*, 157 Fla. 685, 697, 27 So.2d 276, 282 (1946), cert. denied, 329 U.S. 799, 67 S.Ct. 491, 91 L.Ed. 683 (1947). 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. *Department of Health & Rehabilitative Servs. v. American Healthcorp.*, 471 So.2d 1312, 1315 (Fla. 1st DCA1985), adopted, 488 So.2d 824 (Fla. 1986). 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. Bentley*, 496 So.2d 862, 864 (Fla. 2d DCA1986), review denied, 504 So.2d 767 (Fla.1987). Thus, the more narrowly drawn section 893.13(1)(e) controls over the more general provisions of section 397.12.

This conclusion is further supported by section 893.15, Florida Statutes (1989), which provides in language paralleling section 397.12 that "[a]ny person who violates s. 893.13(1)(f) or (1)(g) relating to posses-

sion may, in the discretion of the trial judge, be required to participate in a drug rehabilitation program." (Footnote omitted.) Why would this statute exist if it were not intended to specify which violators of chapter 893 would be eligible for referral to a drug treatment program? See *State v. Edwards*, 456 So.2d 575 (Fla. 2d DCA1984) (when violations of section 893 transpire, the trial court's authority to exercise its discretion under section 397.12 is limited to violations of section 893.13 relating to possession). Because Scates bought cocaine within 1000 feet of a school, the statute requires that he be imprisoned for three years.

I respectfully dissent.

McDONALD and HARDING, JJ., concur.



Jean Max LIATAUD, Petitioner.

v.

STATE of Florida, Respondent.

No. 78626.

Supreme Court of Florida.

Sept. 3, 1992.

Application for Review of the Decision of the District Court of Appeal—Direct Conflict of Decisions, Fourth District—Case No. 90-3221 (Broward County).

Richard L. Jorandby, Public Defender and Tanja Ostapoff, Asst. Public Defender, West Palm Beach, for petitioner.

Robert A. Butterworth, Atty. Gen., Joan Fowler, Bureau Chief, Sr. Asst. Atty. Gen., and Dawn S. Wynn, Asst. Atty. Gen., West Palm Beach, for respondent.

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT, P.O. BOX 3315, WEST PALM BEACH, FL 33402

STATE OF FLORIDA

CASE NO. 91-01024

Appellant(s),

vs.

ANN BRANCH

L.T. CASE NO 90-17287 CF
BROWARD

Appellee(s).

March 1, 1993

BY ORDER OF THE COURT:

ORDERED that appellee's motion filed December 12, 1991,
for rehearing and certification to the Florida Supreme Court is
hereby denied.

I hereby certify the foregoing is a
true copy of the original court order.



MARILYN BEUTTENMULLER
CLERK.

cc: Attorney General-W. Palm Beach
Public Defender 15

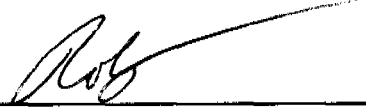
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MAR 2 1993

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy the Appendix has been furnished by courier to Michelle A. Smith, Assistant Attorney General, 1655 Palm Beach Lakes Blvd., Third Floor, West Palm Beach, Florida 33401 this 2 day of APRIL, 1993.



Attorney for Ann Branch