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IN THE SUPREME COURT OF FLORIDA

ANN BRANCH,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

CASE NO. 81,536

PETITIONER'S BRIEF ON THE MERITS

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AUTHORITIES CITED

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, Fourth District. Respondent was the prosecution and 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, Ann Branch, was charged by Information with Purchase of Cocaine within a 1000 feet of a school (R12-13). On March 22, 1991, Petitioner withdrew her initial plea of not guilty and entered a plea of guilty as charged (R3-6, 8-10, 19).

At the change of plea hearing, Petitioner testified that she had a one and a half year history of crack cocaine abuse and that she used cocaine a couple of times a week (R6). Petitioner also testified that she wanted to undergo drug treatment; that she has a problem that needs help; and that she is amenable to drug therapy and rehabilitation. Petitioner did not know that she was within 1000 feet of a school (R7-8).

Petitioner filed a motion for a downward departure sentence and to sentence her pursuant to section 397.12 Fla. Stat. (1989) (R14-17). After explaining the terms and consequences of the change of plea, the trial court sentenced Petitioner pursuant to Section 397.12, Fla. Stat. (1989). The trial court did not impose the three year mandatory minimum under Section 893.13(1)(e) Fla. Stat. (1989). Petitioner was placed on two and a half (2½) years probation with a special condition that she undergo drug evaluation and treatment and that she submit to random drug testing a minimum of two times per month. A contemporaneous written downward departure order was entered by the trial court (R8-9, 20-24).

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). The certified question was:

> 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).

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). On March 1, 1993 the Fourth District Court of Appeal denied Petitioner's motion for rehearing and certification.

Petitioner timely filed a notice to invoke this Court's discretionary jurisdiction. On July 9, 1993, this Court accepted jurisdiction of this case and ordered Briefs on the Merits. This Brief follows.

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[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

POINT I

In Scates v. State, 603 So. 2d 504 (Fla. 1992), this Court held that a trial judge may refer a defendant convicted under Section 893.13(1)(e)(1) Fla. Stat. (1989) to a drug abuse program pursuant to Section 397.12, Fla. Stat. (1989).

In the instant case Petitioner's sentence of two and a half (2½) years probation with drug evaluation and treatment must be affirmed. The trial court had full authority and was within its discretionary powers to so sentence Petitioner. Ms. Branch meets the criteria for application of Section 397.12 Fla. Stat. (1989). Specifically, she falls within the classification as a drug dependent amenable to rehabilitation.

POINT II

In its written downward departure order, the trial court noted that the crack cocaine which Petitioner purchased from the undercover deputy was "manufactured from cocaine in the Broward Sheriff's Office Crime Laboratory." (R20). In State v. Williams, 18 Fla. L. Weekly S371 (Fla. July 1, 1993), this Court held that the illegal manufacture of crack cocaine by law enforcement officials for use in a reverse sting operation within one thousand feet of a school constitutes governmental conduct which violates the due process clause of the Florida Constitution. In light of Williams, Petitioner is entitled to discharge.

ARGUMENT

POINT I

THE TRIAL COURT DID NOT ERR IN DEPARTING DOWNWARD FROM THE THREE YEAR MANDATORY MINIMUM SENTENCE OR IN SENTENCING PETITIONER PURSUANT TO SECTION 397.12, Fla. Stat. (1989).

In Scates v. State, 603 So. 2d 504 (Fla. 1992), this Court held that a trial judge may refer a defendant convicted under Section 893.13(1)(e)(1), Fla. Stat. (1989) to a drug abuse program pursuant to Section 397.12, Fla. Stat. (1989). In the instant case, at sentencing, the trial judge found that Petitioner was a drug dependent amenable to rehabilitation pursuant to Section 397.12, Fla. Stat. (1989). Following her guilty plea to purchasing cocaine within one thousand feet of a school, Petitioner was placed on two and a half (2½) years of probation with drug evaluation and treatment. The trial judge did not impose the three (3) year mandatory minimum sentence specified in Section 893.13(1)(e)(1), Fla. Stat. (1989) (R20-24).

The trial judge did not abuse his discretion for failing to do so. Ms. Branch meets the criteria for application of Section 397.12, Fla. Stat. (1989). Specifically, she falls within the classification as a drug dependent amenable to rehabilitation.

Upon the authority of Scates, this Court must quash the opinion of the Fourth District.

POINT II

PETITIONER'S RIGHT TO DUE PROCESS OF LAW WAS VIOLATED BY THE BROWARD COUNTY SHERIFF'S OFFICE USE OF CRACK COCAINE ROCKS WHICH IT HAD ILLEGALLY MANUFACTURED AND THEN DISTRIBUTED

In its written downward departure order the trial court noted that the crack cocaine which Petitioner purchased from the undercover deputy was manufactured from cocaine in the Broward Sheriff's Office Crime Laboratory (R20).

Fla. R. App. P. 9.140 provides in pertinent part: "In the interest of justice, the court may grant any relief to which any party is entitled." In the instant case, Petitioner is entitled to discharge based upon the outrageous police conduct in manufacturing the cocaine involved in this case. In State v. Williams, 18 Fla. L. Weekly S371 (Fla. July 1, 1993), this Court held that the illegal manufacture of crack cocaine by law enforcement officials for use in a reverse sting operation within one thousand feet of a school constitutes governmental conduct which violates the due process clause of the Florida Constitution.

Petitioner is entitled to discharge under Williams because the error in this case is fundamental. See, Grissett v. State, 594 So. 2d 321 (Fla. 4th DCA 1992), appeal dismissed, 599 So. 2d 1280 (Fla. 1992). As this Court stated in Ray v. State, 403 So. 2d 956, 960 (Fla. 1981):

> This Court has indicated that for error to be so fundamental that it may be urged on appeal, though not presented below, the error must amount to a denial of due process. Castor v. State, 365 So. 2d 701, 704 n.7 (Fla. 1978). See State v. Smith, 240 So. 2d 807 (Fla. 1970).

In the interest of justice and based upon the outrageous police conduct in this case, Petitioner must be discharged.

CONCLUSION

Based on the foregoing Arguments and the authorities cited therein, Petitioner respectfully requests this Honorable Court to quash the opinion of the Fourth District Court of Appeal and reverse this cause.

Respectfully submitted,

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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 Floor, West Palm Beach, Florida 33401 by courier this 20th day of JULY, 1993.

Attorney for Ann Branch

IN THE SUPREME COURT OF FLORIDA

ANN BRANCH, Appellant vs. STATE OF FLORIDA, Appellee.	)	CASE NO. 81,536

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.

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

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

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.

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 20th day of JULY, 1993.

Attorney for Ann Branch