IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v. CASE NO. 81,870

CHARLES A. DAVIS,

Respondent.

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PETITIONER'S BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

The respondent, Charles A. Davis, was charged with two counts of armed robbery, and convicted of two counts of robbery. (R 7, 28-29). Respondent's sentencing guidelines score was 60 points which resulted in a recommended sentencing range of community control or 12 to 30 months incarceration, and a permitted sentencing range of any nonstate prison sanction or community control or one to 3 ½ years incarceration. (R 41).

The trial court sentenced appellant, on count I, to one year in county jail, followed by one year community control, followed by four years of probation. On count II, respondent was sentenced to six years of probation, to run concurrent with count I. (R 33-42).

On appeal, respondent challenged the sentence imposed on count one. The First District Court of Appeal reversed the sentence, holding that its decision was controlled by Oglesby v. State, 584 So. 2d 93 (Fla. 1st DCA 1991), in which the court held that a split sentence of county jail incarceration followed by community control constitutes a departure sentence under State v. Van Kooten, 552 So. 2d 830 (Fla. 1988), because community control is not an alternative for a "nonstate prison sanction." 584 So. 2d at 94. Noting that the sentence imposed was less severe than the prison sentence authorized by the guidelines, the First District certified the following question as one of great public importance:

> Does a sentencing disposition which includes combined sanctions of county jail incarceration and community control constitute a departure sentence, when the combined periods of incarceration and community control do not exceed the maximum period of incarceration permitted by the guidelines?

Thereafter, the State sought timely review of the certified question in this Court.

SUMMARY OF ARGUMENT

The First District relied on its decision in Oglesby v. State, 584 So.2d 93 (Fla. 1st DCA 1991), in holding that the sentence imposed in the instant case constituted a departure sentence under this court's ruling in State v. Van Kooten, 522 So.2d 830 (Fla. 1988). However, Oglesby placed an illogical construction on the guidelines cell at issue here, and misread this Court's Van Kooten decision.

The sentence imposed in the instant case does not constitute a departure sentence because the sentence imposed was less restrictive than the sentence permitted, and the same sentence could have been imposed using different wording. Therefore, this court should quash the decision of the First District Court of Appeal vacating the trial court's sentencing order.

ARGUMENT

CERTIFIED QUESTION

> Does a sentencing disposition which includes combined sanctions of county jail incarceration and community control constitute a departure sentence, when the combined periods of incarceration and community control do not exceed the maximum period of incarceration permitted by the guidelines?

Respondent was sentenced on Count I to one year in the county jail, followed by one year of community control, followed by four years of probation. (R 33). The sentencing guidelines called for a recommended range of community control or 12-30 months incarceration, and a permitted range of any nonstate prison sanction, or community control, or one to 3½ years incarceration. (R 41). The issue to be determined by this Court is whether the sentence imposed in the instant case constitutes a departure sentence under the second cell of the sentencing guidelines and this Court's decision in State v. Van Kooten, 522 So. 2d 830 (Fla. 1988).

The First District relied on its decision in Oglesby v. State, 584 So. 2d 93 (Fla. 1st DCA 1991), in holding that this Court's ruling in Van Kooten required a reversal of respondent's sentence. However, Oglesby placed an illogical construction on the guidelines cell at issue here, and misread this Court's Van Kooten decision.

In Van Kooten, the defendant's presumptive guidelines sentence was community control or 12-30 months'

incarceration. Van Kooten received a sentence of thirty months' incarceration in state prison, followed by two years' community control, followed by ten and one-half years of probation. However, Van Kooten's presumptive guidelines range called for community control or 12-30 months incarceration, not community control and 12-30 months incarceration. Thus, because the trial court imposed both the maximum permitted prison term and two years of community control, this Court determined that the sentence constituted an upward departure from the guidelines.

Subsequent to Van Kooten, the First District was faced with a situation in which the defendant was sentenced to twenty-four months' incarceration followed by six months' community control, where his guidelines range called for community control or 12 to 30 months' incarceration. In Ewing v. State, 526 So. 2d 1029 (Fla. 1st DCA 1988), the First District read Van Kooten as prohibiting a combined sentence of community control and state prison incarceration only when the combined sentence exceeds the maximum guidelines incarceration period. The Ewing court based its decision on the committee note to Rule 3.701, Fla.R.Crim.P., which states that "community control is a viable alternative for any state prison sentence less than twenty-four (24) months without requiring a reason for departure." The Ewing court held that this note allows trial courts to substitute community control, in whole or in part, for any incarcerative term recommended by the guidelines, so long as

the combined term of the two sanctions does not exceed the maximum guidelines incarceration period. Thus, regardless of the fact that Ewing's guidelines cell called for "community control or prison," the First District in Ewing held that the trial court's imposition of a combined term of prison and community control was lawful.

However, in Oglesby v. State, supra, the First District held that a combined sentence of county jail followed by community control constituted a departure sentence under Van Kooten. The Oglesby court distinguished Ewing on the grounds that the committee note to Rule 3.701 provides that community control is not an alternative to a nonstate prison sanction and therefore, the reasoning used in Ewing was inapplicable to sentences combining county jail and community control. The Oglesby court also distinguished Tillman v. State, 555 So. 2d 940 (Fla. 5th DCA 1990), in which the Fifth District held that Van Kooten did not prohibit the imposition of a county jail term as a condition of the community control imposed under the second cell of the sentencing guidelines, on the grounds that Tillman involved county jail as a condition of community control, rather than in addition to community control.

In the instant case, the First District again noted that community control is not an alternative to a nonstate prison sanction, and relied on its holding in Oglesby to find that the sentence imposed in the instant case constituted a departure sentence under Van Kooten.

The First District, in both the instant case and in Oglesby, misconstrued Van Kooten. Again, in Van Kooten, the combined term of the community control and incarceration which was imposed exceeded the maximum guidelines incarceration period, thus resulting in a more severe sentence than if the maximum incarcerative term alone had been imposed. This Court in Van Kooten therefore held that a cell permitting "community control or prison" did not authorize a sentence of both the maximum prison term and community control.

In the case at bar, by contrast, the trial court imposed a term of one year in county jail, followed by one year of community control, followed by four years' probation. This sentence is less severe than the 3 1/2-year term of imprisonment the trial court could have imposed. Nevertheless, under the First District's misreading of Van Kooten, this lenient sentence constitutes an upward departure(!) simply because the trial court imposed a combination of county jail time and community control, instead of restricting itself to just one of the options provided by the guidelines cell. This is nonsense.

The only plausible interpretation of the guidelines cell at issue here ("any nonstate prison sanction or community control or prison time"), and of Van Kooten, is that the "ors" in the guidelines cell do not make the listed alternatives mutually exclusive. Rather, it is apparent

that in creating this cell, the legislature intended for the trial court to have discretion to impose either one of the alternatives or any combination of them, so long as the total sentence imposed (excluding probation)[1] does not exceed the maximum incarcerative term. Only in this way does the trial court have the ability to exercise its discretion, after considering the circumstances of an individual case, to impose what it determines to be an appropriate sentence.

As this Court stated many years ago in Cherry Lake Farms, Inc. v. Love, 176 So. 486 (Fla. 1937), legislative intent determines the meaning of the word "or" as it is used in a statute:

> In its elementary sense the word 'or' is a disjunctive particle that marks an alternative, generally corresponding to 'either,' as 'either this or that': a connective that marks an alternative. It often connects a series of words or prepositions, presenting a choice of either. There are, of course, familiar instances in which the conjunction 'or' is held equivalent in meaning to the

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[1] It is well-settled that a trial court may impose a term of imprisonment followed by probation up to the statutory maximum term for a given offense, so long as the incarcerative portion of the split sentence does not exceed the maximum prison term permitted by the defendant's guidelines range. See Horner v. State, 18 Fla. L. Weekly S247 (Fla. April 15, 1993), and Poore v. State, 531 So. 2d 161, 164 (Fla. 1988). However, under the reading of Van Kooten adopted by the First District below, a trial court can not impose such a split sentence if the defendant falls into the guidelines cell of "any nonstate prison sanction or community control or prison," even if the defendant is being sentenced for more than one offense.

> copulative conjunction 'and,' and such meaning is often given the word 'or' in order to effectuate the intention of the parties to a written instrument or of the Legislature in enacting a statute, when it is clear that the word 'or' is used in a copulative, and not in a disjunctive, sense. In statutes of this nature, however, the word 'or' is usually, if not always, construed judicially as a disjunctive unless it becomes necessary in order to conform to the clear intention of the Legislature to construe it conjunctively as meaning 'and.' In ascertaining the meaning and effect to be given the word 'or' when construing a statute, the intent of the Legislature is the determining factor. Employed between two terms which describe different subjects of a power, the word 'or' usually implies a discretion when it occurs in a directory provision, and a choice between two alternatives when it occurs in a permissive provision. Thus, in construing a provision for the recording of chattel mortgages, it was said: 'The disjunctive conjunction "or" is here used in its ordinary and generally accepted sense; it expresses the alternative, and gives to the mortgagee his choice of depositing the mortgage either in the county where the mortgaged property shall at the time be kept or in the county where the mortgagor shall at the time reside.' And in construing a criminal statute, this court has held that --
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> "If a statute makes it punishable to do a particular thing specified, "or" another, "or" another, one commits the offense who does any one of the things, or any two, or more, or all of them.' [citations omitted]

Id. at 488-489.

The legislature sets the floor and the ceiling for sentences and leaves it to the trial judge's discretion to determine an appropriate sentence within the established

sentencing range and the options afforded. The word "or" merely signifies the different sentencing options available to the trial judge within the sentencing range. The trial court may use any combination of the various options as long as it stays within the range. To this extent the word "or" is the functional equivalent of "and/or." There is no logical reason why the legislature would authorize various sentencing options within a particular cell and then prohibit trial judges from combining these options to fashion sentences in individual cases. Any other interpretation might encourage trial judges to impose harsher sentences than they might otherwise impose; that is, when faced with only two options (either this or that), which excludes the third intermediate, and desirable option, judges may choose the harsher penalty. Properly read, Van Kooten holds only that a sentence which is more restrictive than the maximum permitted guidelines prison sentence, or less restrictive than the minimum permitted guidelines sentence, constitutes a departure sentence.

By imposing one year in county jail, followed by one year of community control, followed by four years of probation, rather than three and one-half years' incarceration in state prison, the trial court in the instant case clearly attempted to give respondent an opportunity for rehabilitation by imposing a more lenient sentence than it could have imposed, while at the same time providing a sentence which was commensurate with the

severity of respondent's crimes and which gradually decreased the amount of supervision to which respondent was subject. Also, by keeping respondent out of state prison, this disposition furthered the legislature's goal of making "the best use of state prisons so that violent criminal offenders are appropriately incarcerated." Section 921.001(1), Fla. Stat. (1991). Because the sentence imposed was more restrictive than a nonstate prison sanction and less restrictive than three and one-half years' incarceration, it should not be considered either an upward or downward departure. Again, any construction of the cell which deprives the trial court of an opportunity to impose a lenient period of combined community control, county jail time, or prison time will only encourage trial courts to impose the harshest punishment available, i.e., the maximum prison time allowed.

Finally, it must be noted that if the trial court's carefully considered sentence is held to be a departure from the sentencing guidelines, then on resentencing, the trial court is entitled to impose any legal guidelines sentence. This would include (1) up to 3½ years incarceration or, (2) up to 2 years community control with one year in county jail as a condition of community control. Tillman. Both sentences are entirely legal, each is within the guidelines, and each could be followed by a period of probation up to the statutory maximum.

In view of the above, the questions naturally arise as to why this appeal is being pursued and why should the district court below devise holdings which are entirely useless. There are two comments which can be fairly made. First, this is another of the seemingly endless examples of legal churning which abound in contemporary appellate practice, particularly in the First District. State v. Rucker, 613 So.2d 460 (Fla. 1993). Both this Court and the district court have long condemned the useless and wasteful acts of appealing "errors", which if error, are harmless. See, State v. Strasser, 445 So.2d 322, 323 (Fla. 1983) (courts are not required to do useless acts. "The only effect [of reversal] would be to increase the pressures on the already overburdened judicial system and, ultimately, on the taxpayer. We will not ignore the substance of justice in a blind adherence to its forms.") See, also, Boston v. State, 411 So.2d 1345 (1st DCA) rev. denied, 418 So.2d 1278 (Fla. 1982) (reversal and retrial would be pointless because the result would be the same). See, again, Rucker, 613 So.2d at 462: "Were we to remand for resentencing, the result would be mere legal churning."

The second comment, also a fair critique of contemporary appellate practice, as illustrated here, is that this issue, under the historically tried-and-tested rules of appellate review, should not even be cognizable on appeal because it was not raised in the trial court. Appellant not only did not object to this sentence, he actually sought such sentence.

> [Trial counsel for appellant] as an alternative, Your Honor, I would request he be given some county court jail time followed up by community control or probation in this case.

Sentencing hearing of 19 June 1992, R 213.[2] Had it been raised, then it could have been easily resolved without burdening two appellate courts with this arcane nonsense involving an irrelevant issue and an "error" which produces no prejudice. See, Section 924.33, Florida Statutes which establishes as a term or condition of the legislatively granted right to appeal that no judgment will be reversed or modified unless "error was committed that injuriously affected the substantial rights of the appellant" and it "shall not be presumed that error injuriously affected the substantial rights of the appellant." At the root of these promiscuous and pointless appeals of unpreserved sentencing errors is the pernicious notion that the "purpose for the contemporaneous objection rule is not present in the sentencing process because any error can be corrected by a simple remand to the sentencing judge." State v. Rhoden, 448 So.2d 1013, 1016 (Fla. 1984). This destructively deadly dicta was subsequently partially disavowed in footnote 2 and accompanying text of State v. Whitfield, 487 So.2d 1045, 1046, (Fla. 1986). See also, J. Shaw's concurring in result

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[2] The state failed to point out to the district court below that the issue had not been preserved. As will be seen, however, the district court does not recognize failure to preserve sentencing issues.

only opinion in Walker v. State, 462 So.2d 452, 454 (Fla. 1985) which more emphatically disavowed the Rhoden dicta.

> While it is true that retrying a case is more undesirable than resentencing a convicted defendant, the fact is that both are highly undesirable. The loose language employed in *Rhoden* and the case here will lead to unnecessary and undesirable appellate review of non-fundamental, even harmless, error and to denigration of the trial court process. See the discussion in *Wainwright v. Sykes*, 433 U.S. 72, 88-90, 97 S.Ct. 2497, 2507-2508, 53 L.Ed.2d 594 (1977) on the importance of the contemporaneous objection rule to trial court proceedings. We should limit *Rhoden* and the case here to sentencing procedures involving fundamental errors and retain the heretofore well-established rule that the contemporaneous objection rule is applicable to both guilt and penalty phases of a trial, absent fundamental error. *Castor*, 365 So.2d at 703.
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> ADKINS, J., concurs.

Id.

The First District has expanded the Rhoden dicta, in conjunction with a misreading of Robinson v. State, 373 So.2d 898 (Fla. 1979), into a rule that all sentences are presumptively illegal and may be appealed. The district court erroneously reasons that Robinson affirmatively creates, not merely preserves, a right to appeal all events which occur at or after the entry of a plea and conviction, regardless of whether the claimed "error" is fundamental. Accordingly, the district court reasons, some sentences are illegal, therefore, all sentences are appealable because any sentence cannot be said to be legal until it has been fully briefed and reviewed de novo by an appellate court.

Restated, all sentences are presumptively illegal, the contemporaneous objection rule does not apply to any sentencing proceeding, and there is a right to a de novo appeal of all sentences, even those which are consistent with the sentencing guidelines, the plea bargain, and the statutorily authorized maximum. Ford v. State, 575 So.2d 1335 (Fla. 1st DCA, rev. denied, 581 So.2d 1318 (Fla. 1991).

The state urges this court to correct the first district's misreading of Robinson, Rhoden, and Whitfield re: the right to appeal sentences.

In sum, the misreading of Van Kooten and the guidelines cell at issue leads to an absurd result in the instant case, and it will unreasonably restrict trial judges' discretion in creative sentencing, encourage trial courts to impose longer prison sentences, and lead to unnecessary overcrowding of the state's prisons. Therefore, this Court should answer the certified question in the negative and quash the First District's decision below.

CONCLUSION

The district court should be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing brief has been furnished by U.S. Mail to P. Douglas Brinkmeyer, Assistant Public Defender, Leon County Courthouse, Fourth Floor, North, 301 South Monroe Street, Tallahassee, Florida 32301, this 8 day of July, 1993.

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