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IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v. CASE NO. 81,870

CHARLES A. DAVIS,

Respondent.

RESPONDENT'S BRIEF ON THE MERITS

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SECOND JUDICIAL CIRCUIT

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v.	:	CASE NO. 81,870
CHARLES A. DAVIS,	:	
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	:	

RESPONDENT'S BRIEF ON THE MERITS

I PRELIMINARY STATEMENT

The state seeks review from the decision of the First District Court of Appeal in Davis v. State, 18 Fla. L. Weekly D1244 (Fla. 1st DCA May 13, 1993) (copy attached as an appendix). Petitioner's brief will be referred to as "PB," followed by the appropriate page number in parentheses.

II STATEMENT OF THE CASE AND FACTS

Respondent accepts the state's statement as reasonably accurate.

III SUMMARY OF ARGUMENT

There is no need for this Court to decide this case. It has already held in State v. VanKooten that when the sentencing guidelines call for community control or 12-30 months incarceration, a judge may not impose county jail time and community control. "Or" means "or," not "and/or." The lower tribunal has created its own "anomaly" by carving out an exception to this Court's decision which it did not need to do, and which only causes further confusion in the application of the soon-to-be-replaced sentencing guidelines.

This Court should affirm on authority of State v. VanKooten.

IV ARGUMENT

CERTIFIED QUESTION/ISSUE PRESENTED

> 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 would add the following to the end of the question, in order to narrow the issue:

> , WHEN THE SENTENCING GUIDELINES CALL FOR COMMUNITY CONTROL OR 12-30 MONTHS.

There is no need for this Court to decide this case. It has already held in State v. VanKooten, 522 So. 2d 830 (Fla. 1988), that when the sentencing guidelines call for community control or 12-30 months incarceration, a judge may not impose county jail time and community control. "Or" means "or," not "and." The lower tribunal has created its own "anomaly" by carving out an exception to this Court's decision which it did not need to do, and which only causes further confusion in the application of the soon-to-be-replaced sentencing guidelines.[1]

This Court's decision in State v. VanKooten makes respondent's sentence an invalid sentence under the guidelines. 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 the cases cited therein, which all follow VanKooten.

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[1]House Bill 39B, passed during the recent special session and signed by the governor on June 9, 1993, totally revamps our sentencing guidelines scheme, effective January 1, 1994.

The First District Court of Appeal carved out an exception in Ewing v. State, 526 So. 2d 1029 (Fla. 1st DCA 1988) that finds VanKooten inapplicable as long as the combined periods of incarceration and community control do not exceed the guidelines range. This so-called 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, 526 So. 2d at 1031:

> The Florida Supreme Court's opinion in State v. VanKooten, 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 VanKooten--unlike the sentence at bar--exceeded the recommended guideline range, such circumstance was not the basis of the VanKooten 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 VanKooten 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 VanKooten, I would vacate the sentences imposed and remand for resentencing.

This Court clearly based the VanKooten decision on the word "or." This conclusion is supported by the rules of construction requiring criminal statutes to be strictly construed according to their plain meaning, and in favor of the defendant. §775.021(1), Fla. Stat.[2]

Even after quoting the holding of Cherry Lake Farms, Inc. v. Love, 176 So. 486 (Fla. 1937), in which this Court clearly stated the legislature's use of the term "or" means the disjunctive or in the alternative (PB at 8), the state boldly claims (PB at 10), that the "or" in the sentencing guidelines rule means "and/or." The state has not cited any authority for this proposition, because there is none. This Court has held that "or" in a court rule, just like in a statute, means "or." Sparkman v. McClure, 498 So. 2d 892 (Fla. 1986).

The state further makes a broadside attack on the right of a criminal defendant to appeal an illegal sentence (PB at

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[2]This Court's decision in the later case of Skeens v. State, 556 So. 2d 1113 (Fla. 1990), does not affect this Court's VanKooten decision, as the Second District has indicated in Felty v. State, 616 So. 2d 88 (Fla. 2nd DCA 1993), review pending, case no. 81,517.

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 alternative 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.

12-15), and would lure this Court into a holding that such appeals are unauthorized. The state's vain effort to argue that respondent could not raise the issue in the appellate court, because he somehow agreed to the sentencing scheme at issue here, must be rejected on authority of the very cases cited by the state.

The state also fails to acknowledge that one cannot agree to an illegal sentence. Williams v. State, 500 So. 2d 501 (Fla. 1986).

It is important to note that the exception the First District Court of Appeal carved out of VanKooten 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 (Fla. 1st DCA 1991).

Thus, the First District Court of Appeal's reasoning has led it to its own petard -- 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 and Collins v. State, 596 So. 2d 1209 (Fla. 1st DCA 1992), is flawed and should not be acceptable to this Court.

This Court should affirm on authority of State v. VanKooten.

V CONCLUSION

Based upon the foregoing argument, reasoning, and citation of authority, respondent requests that this Court decline to accept review; or, in the alternative, answer the certified question in the negative and approve the decision of the First District Court of Appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Sonya Roebuck Horbelt, Assistant Attorney General, by delivery to The Capitol, Plaza Level, Tallahassee, Florida, and a copy has been mailed to respondent, this 13th day of July, 1993.

P. DOUGLAS BRINKMEYER

IN THE DISTRICT COURT OF APPEAL

FIRST DISTRICT, STATE OF FLORIDA

CHARLES A. DAVIS,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND DISPOSITION THEREOF IF FILED.

CASE NO. 92-2796

Opinion filed May 13, 1993.

An Appeal from the Circuit Court for Duval County; Frederick Tygart, Judge.

Nancy A. Daniels, Public Defender, and P. Douglas Brinkmeyer, Assistant Public Defender, Tallahassee, for Appellant.

Robert A. Butterworth, Attorney General; Sonya Roebuck Horbelt, Assistant Attorney General, and Amelia L. Beisner, Assistant Attorney General, Tallahassee, for Appellee.

JOANOS, Chief Judge.

Appellant challenges the sentences imposed upon his conviction of two counts of robbery. He contends the sentence, which includes both county jail time and community control followed by probation, constitutes an illegal departure sentence and that no reason for departure was provided. We reverse.

MAY 13

2nd JUDICIAL CIRCUIT

An information charged appellant with committing two counts of armed robbery on September 22, 1991; the weapon allegedly used in the robbery was a belt buckle. A jury found appellant guilty on both counts of the lesser offense of robbery. On Count I, the trial court imposed a sentence of one year in county jail, followed by one year of community control, to be followed by four years of probation. On Count II, the trial court imposed a probationary term of six years, to be served concurrently with the sentencing on Count I. On a "Category 3 - Robbery" scoresheet, appellant's total score was 60 points, which equated to 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 3-1/2 years incarceration.

In State v. VanKooten, 522 So. 2d 830, 831 (Fla. 1988), the supreme court ruled that, when so provided by the guidelines, either community control or incarceration could be imposed, but not both. In Ewing v. State, 526 So. 2d 1029 (Fla. 1st DCA 1988), this court construed the VanKooten proscription as applicable only where the combined sentences exceeded the maximum period of incarceration permitted under the guidelines. The court reasoned that a departure sentence does not result where the combined sanctions do not exceed the maximum guidelines incarcerative period.

A contra result was reached in Oglesby v. State, 584 So. 2d 93 (Fla. 1st DCA 1991), which, like the instant case, involved

combined sanctions of county jail incarceration and community control. In Oglesby, this court held that a combined sanction of community control and incarceration in county jail constitutes a departure. The Oglesby majority recognized that in Tillman v. State, 555 So. 2d 940 (Fla. 5th DCA 1990), the fifth district held it was not a departure to require jail time as a condition of community control; distinguished Ewing on the ground that it involved a state prison sentence, whereas Oglesby involved a county jail sentence, which was not imposed as a condition of community control; and concluded that its decision in that case was controlled by VanKooten. In so holding, the majority opinion noted that the decision might produce an anomaly, in that Ewing permitted the greater sanction of state prison combined with community control, while the decision in Oglesby disapproved the less severe combined sanction of county jail and community control.

The instant case involves a county jail sentence followed by a period of community control. The combined total of the two sanctions does not exceed the maximum incarcerative term permitted by the guidelines. Since the sentence imposed was considerably less severe than the state prison sentence authorized by the guidelines, it appears somewhat peculiar to consider the combined sanctions to be a departure. Nevertheless, as the Oglesby panel observed, the Committee Notes to Florida Rule of Criminal Procedure 3.701(d)13 emphasize that community control is not an alternative for a "nonstate prison sanction." 584 So. 2d at 94.

In short, we conclude the resolution of this case is controlled by this court's decision in Oglesby. Because the guidelines distinction between the sanctions of community control and a nonstate prison sanction produce an anomalous result in both this case and in Oglesby, we certify the following as a question 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?

Accordingly, the challenged sentences are vacated, and this cause is remanded for resentencing, pursuant to Oglesby v. State, 584 So. 2d 93 (Fla. 1st DCA 1991).

ALLEN and MICKLE, JJ., CONCUR.