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IN THE SUPREME COURT OF FLORIDA

STEPHANIE A. CARDER,
Petitioner,

v. CASE NO.: 82,668

STATE OF FLORIDA,
Respondent.
______________________/

ON DISCRETIONARY REVIEW FROM
THE FIFTH DISTRICT COURT OF APPEAL

RESPONDENT'S BRIEF ON THE MERITS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

SUMMARY OF ARGUMENT 1

ARGUMENT 3

POINT ON APPEAL

WHETHER BACK-END SPLIT SENTENCES ARE ILLEGAL AND WHETHER THEY CONSTITUTE A DOWNWARD DEPARTURE WHICH WOULD REQUIRE WRITTEN REASONS.

CONCLUSION 8

CERTIFICATE OF SERVICE 8

TABLE OF AUTHORITIES

CASES

Bryant v. State,
591 So. 2d 1102 (Fla. 5th DCA 1992) 4

Disbrow v. State,
Case no.: 82,857 2

Ferguson v. State,
594 So. 2d 864 (Fla 5th DCA 1992) 3, 4

Gaskins v. State,
607 So. 2d 475 (Fla. 1st DCA 1992) 4

Horner v. State,
617 So. 2d 311 (Fla. 1993) 4

Humphrey v. State,
579 So. 2d 335 (Fla. 2d DCA 1991) 5

Poore v. State,
531 So. 2d 161 (Fla. 1988) 3, 4

Pope v. State,
561 So. 2d 554 (Fla. 1990) 5

State v. Allen,
557 So. 2d 960 (Fla. 4th DCA 1990) 6

State v. Carder,
625 So. 2d 966 (Fla. 5th DCA 1993) 3

State v. McCall,
573 So. 2d 362 (Fla. 5th DCA 1990) 5

State v. McCulloch,
573 So. 2d 395 (Fla. 5th DCA 1991) 5

State v. Waldo,
582 So. 2d 820 (Fla. 2d DCA 1991) 5

Steinhorst v. State,
412 So. 2d 332 (Fla. 1982) 6

Walker v. State,
604 So. 2d 913 (Fla. 1st DCA 1992) 4

Whitehead v. State,
498 So. 2d 863 (Fla. 1986) 6

OTHER AUTHORITIES

§ 921.187, Florida Statutes (1987) 4

§948.01(11), Florida Statutes (1991) 6

§775.084(4)(e), Florida Statutes (1993) 6

Fla.R.Crim.P. 3.701 5

SUMMARY OF THE ARGUMENT

The State's position in this case is that the sentence imposed is illegal or at the very least an improper downward departure with no written reasons. Numerous appellate courts have held that a sentence which includes probation should require the defendant to complete any incarceration portion of the sentence prior to serving any probation or community control. While some of the goals of such sentencing are not without some merit[1], there are numerous sentencing options which are legal and which can accomplish the same purpose. A probationary split sentence or even a true split sentence both reward a defendant with a less restrictive form of observation than continuous imprisonment while still holding a potential penalty over his head for failure to conform his behavior.

To allow the existence of back-end split sentences without even requiring any written reasons for departure defeats the entire concept of the guidelines. The guidelines already weigh both the quality and the quantity of crimes committed by a defendant in determining the permitted sentence. When a defendant's score places him in a range which requires incarceration, such sentence should be imposed absent some written reason to sentence otherwise. The trial court's discretion is the amount of incarceration to impose within the guideline range and includes whether is add a term of probation which does not exceed the statutory maximum.

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[1]Such as not overburdening our prisons and giving another chance to non-violent individuals.

Without written reasons justifying such action, the trial court's discretion under the guidelines should not include the power to impose a sentence in which a defendant serves no period of incarceration when such is required by the guidelines.[2] To permit the trial court's creation of such a sentence would be to improperly allow the trial court to legislate a new sentencing option which violates the mandatory incarceration required by the guidelines.

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[2]An illustration of the potential for abuse by the trial court can be seen in the case Disbrow v. State, Case no.: 82,857, which is being considered at the same time as this case. In Disbrow, the defendant's permitted range under the guidelines was 17-40 years, yet the trial court still imposed only two years community control with a seventeen year suspended sentence given to "satisfy" the requirements of the guidelines.

ARGUMENT

POINT OF LAW

WHETHER BACK-END SPLIT SENTENCES ARE ILLEGAL AND WHETHER THEY CONSTITUTE A DOWNWARD DEPARTURE WHICH WOULD REQUIRE WRITTEN REASONS.

The Petitioner's recommended guideline range in this case was 2-1/2 to 5-1/2 years of incarceration. (R 51) Instead of imposing the sentence required by the guidelines, the trial court gave the Petitioner a sentence of 2-1/2 years probation followed by 2-1/2 years of incarceration. (R 4-5, 46) However, the incarceration portion of the sentence was set up to be eliminated if the Petitioner successfully completed his probation. (R 4-5, 46) The State asserted that such a sentence was illegal, and the Fifth District Court of Appeal agreed. State v. Carder, 625 So. 2d 966 (Fla. 5th DCA 1993).

On appeal the State submitted that the sentence imposed was illegal and cited the case Poore v. State, 531 So. 2d 161 (Fla. 1988), in support. Poore set out five sentencing alternatives none of which includes a back-end split. As noted by the Fifth District Court of Appeal in Ferguson v. State, 594 So. 2d 864 (Fla 5th DCA 1992):

> In Poore, the court set out five sentencing alternatives: 1) a period of confinement; 2) a "true split sentence" consisting of a total period of confinement with a portion of the confinement period suspended and the defendant placed on probation for that suspended portion; 3) a "probationary split sentence" consisting of a period of confinement, none of which is suspended, followed by a period of probation; 4) a

> Villery sentence, (footnote omitted) consisting of a period of probation preceded by a period of confinement imposed as a special condition; and 5) straight probation. 531 So. 2d at 164.

In Ferguson, the defendant was given 364 days in the county jail suspended upon successful completion of probation. The Fifth District Court held that the sentence was not one of the sentencing alternatives set out in Poore nor was there express authority for this type of conditional or suspended sentence in Section 921.187, Florida Statutes (1987). Ferguson at 866. See also, Bryant v. State, 591 So. 2d 1102 (Fla. 5th DCA 1992) (sentence of ten years prison the serving of which was subject to whether the defendant successfully completed two years community control was illegal).

Another case holding that such sentences are illegal is Gaskins v. State, 607 So. 2d 475 (Fla. 1st DCA 1992). In Gaskins, the defendant was given a ten year "conditional suspended sentence" which would not be served if the defendant completed five years of probation. Id. at 475. The First District Court of Appeal held that the sentence was illegal.[3]

An additional reason the sentence is illegal is that case law has consistently required that the incarceration portion of a sentence be completed prior to the commencement of the probationary portion of the sentence. See Horner v. State, 617 So. 2d 311 (Fla. 1993), Walker v. State, 604 So. 2d 913 (Fla. 1st DCA 1992),

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[3]In fact, the First District certified a question concerning not only the issue of the conditional suspended sentences but also the issue of whether the defendant could wait until he violated the probation before he challenged original sentence. Id. at 476.

Humphrey v. State, 579 So. 2d 335 (Fla. 2d DCA 1991). The court imposed prison time to come after the Petition's probation. The only way incarceration would not be served after probation is if the Petitioner does not violate his probation. The idea of basing any potential legality on such a possibility further illustrates the problems with such a sentencing scheme.

Even if the Petitioner's sentence is found to be a legal possibility, it is still improper because it is a downward departure for which the trial court did not provide any written reasons at the time the sentence was imposed. See, Pope v. State, 561 So. 2d 554 (Fla. 1990), State v. McCulloch, 573 So. 2d 395 (Fla. 5th DCA 1991). In the instant case, the trial court did not provide any written reasons for granting a departure sentence, and upon remand, the trial court must resentence the Petitioner within the guidelines. See, Pope.

The case State v. Waldo, 582 So. 2d 820 (Fla. 2d DCA 1991), the trial court imposed a five and one-half year suspended prison sentence service of which was dependent upon the defendant's completion of two years of community control. The Second District noted

> When sentencing pursuant to the guidelines, a trial judge may impose a split sentence, but if he does, the incarceration portion must not be less than the minimum guidelines range. Comm.Note (d)(12) Fla.R.Crim.P 3.701. The trial judge may, of course, depart from this requirement if he provides a valid written reason for doing so. State v. McCall, 573 So. 2d 362 (Fla. 5th DCA 1990). The appellee's sentence

> did not require him to serve at least the minimum sentence required by the guidelines and was, accordingly, a downward departure. Since the trial judge failed to provide written reasons for departing from the guidelines, and the state did not agree to the downward departure, the appellee's sentence must be reversed. State v. Allen, 557 So. 2d 960 (Fla. 4th DCA 1990).

The Petitioner submits that §948.01(11), Fla. Stat. (1991), authorizes the back-end, conditional sentences evidently without regard to the guidelines.[4] However, the State disagrees. To attempt to allow its application without regard to the guidelines would grant the trial court such unfettered discretion that the guidelines would be rendered meaningless. While the exact application of that section is questionable, nowhere does it exempt itself from the requirements of the guidelines. A comparison can be seen by looking at the old habitual statute which was not exempt from the guidelines as opposed to the new statute which specifically provides that it is outside the dictates of the §921.001. See, §775.084(4)(e) (1993); Whitehead v. State, 498 So. 2d 863 (Fla. 1986).

A last point is that the Petitioner submits that the sentence imposed is within the guidelines. To support such an argument, the claim is made that a prison sentence has been imposed which the Petitioner "may" in fact serve one day. While everyone is aware of

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[4]The State also notes that no attempt to rely upon §948.01(11) was made at the district court level, and, therefore, any such argument should be found to be not properly preserved by the Petitioner. See, Steinhorst v. State, 412 So. 2d 332 (Fla. 1982).

the fact that the realities of the system are such that defendants often actually serve little of the sentences imposed, the idea that it is sufficient that a defendant "may" serve some prison time would stretch the guidelines beyond not only recognition but of any legitimate use.

CONCLUSION

Based on the arguments and authorities presented above, the State respectfully prays this honorable Court approve the decision of the district court.

Respectfully submitted,

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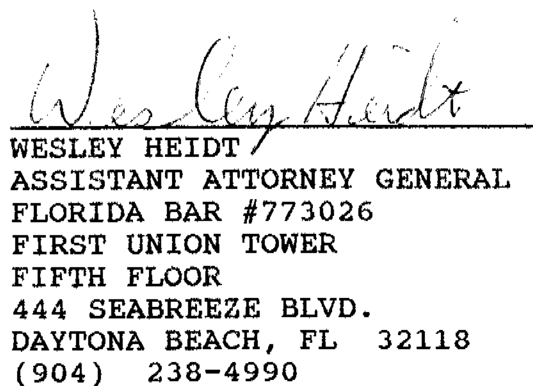
ATTORNEY GENERAL



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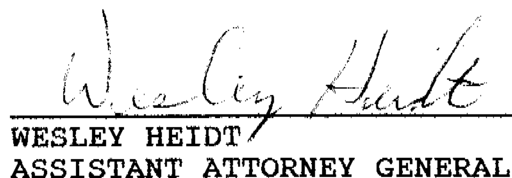
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above Answer Brief has been furnished by delivery to James R. Wulchak, attorney for the petitioner, Assistant Public Defender, 112 Orange Avenue, Suite A, Daytona Beach, Florida 32114, this 30th day of March 1994.



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