IN THE SUPREME COURT OF FLORIDA

DARYL SHAWN GUILFORD, et al., Petitioners/Appellants, versus STATE OF FLORIDA, Respondent.	S.CT. CASE NO. 83,500 DCA CASE NOS. 92-1389, 92-2045, 92-2240 and 92-2796

ON DISCRETIONARY REVIEW FROM THE FIFTH DISTRICT COURT OF APPEAL

PETITIONERS' BRIEF ON THE MERITS

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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STATEMENT OF THE CASE AND FACTS

The petitioners involved in this case all received so-called "back-end split sentences", which consist of a period of probation followed by a period of incarceration in the Department of Corrections. The incarceration would be eliminated if the probation was successfully completed (Guilford R14). The sentences were imposed by the Honorable John Dean Moxley of the Brevard County Circuit Court. The State appealed the sentences on the grounds that they were downward departures from the guidelines without written reasons. The State also contended that the sentences were illegal because they were not authorized by this Court's decision in Poore v. State, 531 So.2d 161 (Fla. 1988).

The Fifth District Court of Appeal consolidated these cases on a motion by the State. The Fifth D.C.A. reversed the sentence on the grounds raised by the State, State v. Guilford, et al, 633 So.2d 548. The appellate court acknowledged that the issue of the legality of "back-end" split sentences had been certified to this Court in State v. Carder, 625 So.2d 966 (Fla. 5th.DCA 1993). This Court accepted jurisdiction over this appeal based on Jollie v. State, 405 So.2d 418 (Fla. 1981).

SUMMARY OF ARGUMENT

Section 948.01(11), Florida Statutes (1991), specifically authorizes the type of sentence imposed here, a reverse split sentence with a term of probation to be followed by incarceration (which may or may not be modified by the court upon successful completion of the probationary period). A specific statute covering a particular subject matter controls over a broader statutory provision covering the same generalized subject matter. Additionally, where two different statutory constructions are possible, the rule of lenity mandates that, in a criminal case, the courts construe the statutes in the light most favorable to the accused.

Moreover, if the guidelines are still applicable to the sentencing scheme, the sentence **as imposed** does fall within the guidelines range since a term of imprisonment **was** imposed. Since the term of incarceration may or may not actually be served, depending on some future actions of the defendant and upon a future motion to the trial court, a downward departure does not occur until such time as the incarcerative portion of the sentence is vacated.

Finally, Poore v. State, 531 So.2d 161 (Fla. 1988) was a case intended to explain how the sentencing guidelines apply when the probationary portion of a split sentence is violated. Poore is not a case which lists the only five legal types of sentence that may be imposed.

For these reasons the sentence imposed here is lawful. The

certified question should be answered in the negative and the case remanded for imposition of the original "back end split sentence."

ARGUMENT

SINCE FLORIDA STATUTES SPECIFICALLY AUTHORIZE A REVERSE SPLIT SENTENCE, IT IS NOT A DOWNWARD DEPARTURE TO IMPOSE A TERM OF PROBATION TO BE FOLLOWED BY A TERM OF INCARCERATION.

Section 948.01(11), Florida Statutes (1991), specifically authorizes the imposition of a reverse or "back end" split sentence, whereby a probationary term is to be followed by a period of incarceration (which may or may not be vacated by the court at some future date, depending on the actions of the defendant). That section provides:

> The court may also impose a split sentence whereby the defendant is sentenced to a term of probation which may be followed by a period of incarceration or, with respect to a felony, into community control, as follows:
>
> (a) If the offender meets the terms and conditions of probation or community control, any term of incarceration may be modified by court order to eliminate the term or incarceration.
>
> (b) If the offender does not meet the terms and conditions of probation or community control, the court shall impose a term of incarceration equal to the remaining portion of the order of probation or community control.

The provisions of this specific statute authorizing a probationary term first to be followed by incarceration, it is submitted, should apply over the more general sentencing guidelines statute. The law provides that a special statute covering a particular subject matter is controlling over a general statutory provision covering the same and other subjects in general terms. See, e.g., Adams v. Culver, 111 So.2d 665, 667 (Fla.

1959). See also Busic v. United States, 446 U.S. 398, 406 (1980).

The preamble to Chapter 91-225, Laws of Florida (1991), which enacted this subsection of 948.01, makes clear that the legislative intent was to allow for this type of "stick following the carrot" sentence outside of the stricter confines of the sentencing guidelines. That preamble states:

> WHEREAS, Florida is facing an ever-increasing prison and jail population and a severe budgetary shortfall, and
> WHEREAS, incarceration is an expensive method of dealing with offenders, and
> WHEREAS, offenders are currently serving, on the average, less than one-third of their sentences, and
> WHEREAS, judges sentencing offenders are faced with either placing an offender on probation or sending the offender to prison, resulting in an unacceptably short period of time being served due to overcrowded prisons, and
> WHEREAS, there is a lack of sufficient intermediate sanctions, punishments, and treatment programs, and
>
> * * *
>
> WHEREAS, both the inmate population within the Department of Correction and the population under parole and probation supervision by the Department of Corrections had increased from 125,337 in November 1989 to 134,116 in November 1990, and
> WHEREAS, it is critical that state and local correctional authorities cooperate and combine forces to protect the public, reduce recidivism and effectively punish criminal behavior, and
> WHEREAS, the state should reserve its prison system for the most serious and violent criminals and should begin, through this first phase of corrections partnership, to provide community-based correctional programs and treatment,
> . . . .

Thus, it is clear that the legislature was providing an alternative "sufficient intermediate sanction" by the reverse split sentence which may take the specifically authorized punishment outside of the restrictions of the sentencing guidelines which would cause further overcrowding of the prison system.

Further, the rule of lenity provides that statutes shall be strictly construed and, where the statutes are susceptible of differing constructions, they shall be construed most favorably to the accused. §775.021(1), Fla. Stat. (1991). Thus, the two statutes, one the more general sentencing guidelines statute and the second the more specific reverse split sentence statute, should be construed to permit the reverse split sentence to be imposed regardless of the constraints of the guidelines setup.

Next, with the exception of Mr. Raub, the sentences imposed here include five years in prison for Guilford and three years in prison for Armstrong. These sentences fall within the upper end of the permitted range (Guilford) and the recommended range (Armstrong). Thus, guideline sentences were imposed. The incarceration may be eliminated at some future time, but when the sentences were imposed no departure from the guidelines occurred. If the sentencing guidelines do apply to this type of reverse split sentence, it is submitted that the sentence is not a downward departure until such time in the future, following the probationary period, that the trial court decides to rule favorably on a defense motion to vacate the term of incarceration. At that time, the court could issue written reasons for its then

downward departure, which the state could then appeal. But, by the terms of the sentence imposed here and the terms of section 948.01, the vacation of the term of imprisonment may never come to pass, and the defendant may have to serve the period of incarceration. Thus, it is premature for the state to be attacking the sentence imposed which was in conformity with section 948.01(11) and the sentencing guidelines. It should also be noted that Mr. Raub received an habitual offender sentence, thus a guideline departure was impossible in his case, and that particular reason for reversal, as applied to Raub, is invalid.

Finally, the Fifth District Court of Appeal has held, in this and prior decisions, that Poore v. State, 531 So.2d 161 (Fla. 1988) is an exclusive listing of legal sentences which may be imposed in Florida, Bryant v. State, 591 So.2d 1102 (Fla. 5th.DCA 1992), Ferguson v. State, 594 So.2d 864 (Fla. 5th.DCA 1992). Appellant would point out that Poore came before this Court on the question of what a sentencing judge could do, under the guidelines, when the probationary portion of a split sentence was violated. In writing on the issue of split sentences in general, Justice Barkett wrote that "a judge has five basic sentencing alternatives in Florida" , Poore at 164. Appellant would argue that Poore was not intended to limit possible sentences only to the five alternatives listed that opinion. This case gives this Court the opportunity to make clear whether or not Poore was intended to be such a limitation on innovative or creative sentencing by trial judges.

The sentences imposed here were authorized by statute and are viable legal alternative sanctions to be imposed by the trial court. These cases should be remanded for reimposition of the original "back end split sentence."

CONCLUSION

BASED UPON the cases, authorities, and policies cited herein, the petitioner requests that this Honorable Court quash the decision of the District Court of Appeal, Fifth District, answer the certified question in the negative, and remand for reimposition of the original sentence.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served upon the Honorable Robert A. Butterworth, Attorney General, 444 Seabreeze Boulevard, Fifth Floor, Daytona Beach, Florida 32118, in his basket at the Fifth District Court of Appeal, and mailed to Daryl Guilford, 1920 #80 Woodhaven Circle, Rockledge, Florida 32955; and John Howard, Inmae No. 705302, Madison Correctional Institute, Post Office Box 692, Madison, Florida 32340-0692, on this 11th day of July, 1994.

Kenneth Witts

KENNETH WITTS
ASSISTANT PUBLIC DEFENDER

IN THE SUPREME COURT OF FLORIDA

DARYL GUILFORD, et al.,	)	
	)	
Petitioners,	)	
	)	
vs.	)	S.CT. CASE NO. 83,500
	)	
STATE OF FLORIDA,	)	
	)	
Respondent.	)	
	)	

A P P E N D I X

State v. Guilford, 633 So. 2d 548 (Fla. 5th DCA 1994)

cotics agent working with the Orange County Sheriff's Office. He alleged that he and a "reliable confidential informant" conducted three "controlled buy[s]" from the defendant, Starks. Two took place at Starks' residence. One buy occurred in a car driven by the confidential informant, which was constantly under surveillance by the police. In the first two buys, the confidential informant disappeared into Starks' residence, from the view of the police for a few moments, and reappeared with the purchased cocaine.

Prior to filing his motion to suppress, Starks deposed the police officer who executed the affidavit. The officer testified that the confidential informant had been searched prior to the buys, and that the transactions had all been "taped." No one questioned what was meant by the expression "a controlled buy" but it was obvious the attorneys and police officer all assumed it meant that the confidential informant had been searched for drugs prior to the buys, was given money to buy the cocaine, and that the cocaine was immediately delivered to the police agent after each buy, as was done in this case. The confidential informant was also constantly supervised and monitored during each buy by electronic means, and for the last buy, visually.

Under these circumstances, we think the "controlled buy" exception to reciting a basis for the confidential informant's reliability was established. In *Delacruz v. State*, 603 So.2d 707 (Fla. 2d DCA 1992) the affidavit relied upon apparently did not recite that the confidential informant had made a "controlled buy" from the defendant, and it recited no facts from which the magistrate who issued the search warrant could have concluded adequate surveillance and search of the confidential informant had been made to justify a probable cause finding.

[1-3] Although inquiry into whether an affidavit supporting a search warrant sufficiently supports a probable cause finding must be found within its "four corners" [2] we think the affidavit in this case was sufficient. The magistrate's determination of probable cause comes to us with the presumption of correctness.[3] Here, an experienced drug enforcement officer used the term "controlled buy" three times and stated sufficient facts with regard to the third buy from which it could clearly be inferred that "controlled buy" meant the purchase of a controlled substance made under the supervision and control of police officers so as to establish reliability.[4]

REVERSED and REMANDED.

HARRIS, C.J., and THOMPSON, J., concur.

2. *Schmitt v. State*, 590 So.2d 404 (Fla.1991), *cert. denied*, — U.S. —, 112 S.Ct. 1572, 118 L.Ed.2d 216 (1992).

3. *State v. Price*, 564 So.2d 1239 (Fla. 5th DCA 1990); *State v. Moise*, 522 So.2d 1023 (Fla. 5th DCA 1988).

4. *See State v. Payne*, 201 Neb. 665, 271 N.W.2d 350 (1978).

STATE of Florida, Appellant,

v.

Darryl Shawn GUILFORD, et al., Appellees.

Nos. 92-1389, 92-2045, 92-2240 and 92-2796.

District Court of Appeal of Florida, Fifth District.

March 11, 1994.

The Circuit Court, Brevard County, John Dean Moxley, J., handed down "back-end split sentences" in a number of cases, involving (except in one case) period of jail incarceration, followed by probationary period, and then by prison term applicable only if probation was violated. Appeal was taken.

The District Court of Appeal, Thompson, J., held that sentences were invalid, they followed a sentencing alternative not approved by Supreme Court, and represented a downward departure from sentencing guidelines not supported by written reasons, and they impermissibly provided (except in one case) for an interrupted period of incarceration.

Affirmed in part; reversed in part.

Goshorn, J., concurred specially, and filed opinion.

Criminal Law ⇐982.3(.5), 1217, 1321(1)

"Back-end split sentences," under which defendants served period of jail incarceration, followed by probation, with prison term suspended in event that probation was successfully served, were invalid; sentences did not follow any of the sentencing alternatives laid down by Florida Supreme Court, sentences were downward departure from sentencing guidelines for which written reasons had not been given, and sentences violated rule against imposing interrupted periods of incarceration.

See publication Words and Phrases for other judicial constructions and definitions.

Robert A. Butterworth, Atty. Gen., Tallahassee and Robin Compton Jones, Asst. Atty. Gen., Daytona Beach, for appellant.

James B. Gibson, Public Defender and Kenneth Witts, Asst. Public Defender, Daytona Beach, for appellees Darryl Shawn Guilford and Gregory Mark Raub.

Susan A. Fagan, Asst. Public Defender, Daytona Beach, for appellee Steven M. Armstrong.

THOMPSON, Judge.

The State of Florida, appellant, appeals the sentences imposed against appellees Darryl Shawn Guilford, Gregory Mark Raub, John Howard and Steven M. Armstrong. All of these sentences have been designated as "back-end split sentences." The State argues that back-end split sentences are illegal and that they constitute a downward departure from the sentencing guidelines without contemporaneously filed written reasons. We agree and affirm the convictions, but reverse and remand for resentencing.

This appellate case involves several cases that have been consolidated for appeal.[1] Darryl Shawn Guilford was originally charged in case no. 92–1796–CFA with robbery.[2] On 14 May 1992, Guilford entered a plea of guilty as charged to the offense of robbery and waived any objections to the guidelines scoresheet. Although the guideline scoresheet placed him in the recommended range of four and one-half to five and one-half years in the Department of Corrections (DOC), he was sentenced to a "back-end split sentence" consisting of five years probation with the condition that he serve six months in the Brevard County Jail followed by five and one-half years in the DOC. He was told by the sentencing judge that if he successfully completed his period of probation, the court would modify or eliminate the DOC sentence. Guilford accepted the plea negotiations and began to serve his sentence as announced by the trial judge. The State timely appeals his sentence as a downward departure without written reasons.

The next case which is part of this consolidated appeal is the case of Gregory Mark Raub. On 6 August 1992, Raub was sentenced for a violation of probation and community control. Raub had previously entered pleas and been placed on probation and community control for case no. 84–1888–CFA, trafficking in cocaine and conspiracy to traffic in cocaine;[3] case no. 90–4105–CFA, sale of cocaine (two counts) and possession of cocaine (two counts)[4] and case no. 90–4114–

1. All of these cases are from Brevard county and Circuit Judge John Dean Moxley imposed each of the sentences. This court has previously dealt with back-end sentences. *See State v. Disbrow*, 626 So.2d 1123 (Fla. 5th DCA 1993); *State v. Carder*, 625 So.2d 966 (Fla. 5th DCA 1993).

2. §§ 812.13(1) & 812.13(2)(c), Fla.Stat. (1991).

3. Count I, § 893.135(1)(b)1, Fla.Stat.; Count II, §§ 893.135(4) & 893.135(1)(b)2, Fla.Stat. (1991).

4. Counts I and II, § 893.13(1)(a)1, Fla.Stat. (1991); Counts III and IV, § 893.13(1)(f), Fla. Stat. (1991).

CFA, sale of cocaine and possession of cocaine.[5] Raub was charged with violation of community control or probation in all three of these cases. The State had previously given notice that he was to be sentenced as a habitual offender. His violation of probation and community control resulted from his being found in possession of over 20 grams of marijuana.

The trial judge placed Raub on five years habitual offender probation. He was to serve five years probation at a rehabilitation center called Tampa Crossroads Program. He was also sentenced to serve 15 years in the DOC after probation. The trial judge informed him that if he successfully completed probation, then the sentence of 15 years in the DOC would be eliminated. The State timely appeals the sentence as a downward departure without written reasons.

The State next appeals the sentence imposed on appellee John Howard. Howard was charged with possession of cocaine, battery upon a law enforcement officer and obstructing or opposing an officer without violence.[6] Shortly after his arrest on 18 September 1991, the State filed a notice of intention to seek habitual offender penalties. Howard entered a plea of guilty on 15 November 1991. The plea was accepted and Howard was sentenced to five years in the DOC on Count I and time served on Counts II and III. He was remanded to the DOC. On 12 May 1992 Howard filed a motion for post-conviction relief pursuant to Florida Rule of Criminal Procedure 3.850. As a result of his motion, a hearing was held on 28 August 1992. At that hearing, Judge Moxley vacated the sentence previously imposed and sentenced Howard to five years concurrent probation as to Counts I and II. Howard was also sentenced to one year probation on Count III, to run concurrently with Counts I and II. The five year probationary sentence was to run consecutively with yet another sentence, a 12 year sentence that is not before this court. The State timely appeals this sentence as a downward departure without written reasons.

The final case on this consolidated appeal is the case of Steven M. Armstrong. Armstrong was charged in Brevard County case number 92–12816–CFA with grand theft of a motor vehicle.[7] On 16 September 1992, Howard entered a plea of guilty to the offense as charged. On 2 November 1992, he was adjudicated guilty and placed on probation. His probation was to be followed by three years in the DOC. If he successfully completed the term of probation, the judge informed him that the DOC term would be eliminated. His recommended guideline sentence was three and one-half to four and one-half years in the DOC. His permitted sentence was two and one-half to five and one-half years in the DOC. Special conditions of Armstrong's probation are that he serve three months in the Brevard County jail and 21 months on probation. The State timely appeals this sentence as a downward departure without written reasons.

Each sentence imposed is an illegal sentence. This court has previously held that all sentences must conform to the categories enunciated by the Florida Supreme Court in *Poore v. State*, 531 So.2d 161 (Fla.1988). In *Ferguson v. State*, 594 So.2d 864 (Fla. 5th DCA 1992), *disapproved of by Bradley (L.C.) v. State*, 631 So.2d 1096 (Fla.1994), this court held that only the five sentencing alternatives enumerated by the supreme court in *Poore* would be accepted. The sentences imposed in each of the above cases do not fall within those enumerated sentencing alternatives and are therefore illegal.

Further, the sentences violate Florida Rule of Criminal Procedure 3.701(d)(11). That rule requires that "any sentence outside the permitted guideline range must be accompanied by a written statement delineating the reasons for the departure." The trial judge entered no written reasons in any of the above stated cases.

5. Count I, § 893.13(1)(a)1, Fla.Stat. (1991); Count II, § 893.13(1)(f) Fla.Stat. (1991).

6. Count I, § 893.13(1)(f) Fla.Stat. (1991); Count II, §§ 784.03, 784.07(1) & 784.07(2)(b), Fla.Stat. (1991); Count III, § 843.02, Fla.Stat. (1991).

7. §§ 812.014(1) & 812.014(2)(c)3 Fla.Stat. (1991).

An additional problem with the sentences imposed is that they require interrupted sentences. Florida Statutes do not allow for non-continuous periods of incarceration and probation. *Calhoun v. State*, 522 So.2d 509 (Fla. 1st DCA 1988). Here each of the defendants, except Armstrong, is required to serve time in the county jail followed by a period of probation with the possibility of incarceration in the DOC. This sentence is a non-continuous "interrupted" sentence and, thus, invalid.

For the reasons stated, all of the sentences imposed are illegal and must be reversed. The question whether the back-end split sentences are downward departures from guideline sentences has previously been certified to the Florida Supreme Court. *See State v. Carder*, 625 So.2d at 966, (Fla. 5th DCA 1993). This question does not need to be certified again.

AFFIRMED in part; REVERSED in part.

W. SHARP, J., concurs.

GOSHORN, J., concurs specially, with opinion.

GOSHORN, Judge, concurring specially.

I agree that our decision in *State v. Carder*, 625 So.2d 966 (Fla. 5th DCA 1993) mandates that the sentences be reversed. I would certify the same question this court certified in *Carder, supra*.

WEST KEY NUMBER SYSTEM

ASIAN IMPORTS, INC., a Nebraska corporation, d/b/a Exotica Imports, and Phyllis Firoz, individually, Appellants,

v.

Frank W. PEPE, Sr., Appellee.

No. 92-2580.

District Court of Appeal of Florida, First District.

March 15, 1994.

Mortgagee brought foreclosure action against mortgagors. The Circuit Court, Clay County, L. Haldene Taylor, J., entered default judgment against mortgagors and denied mortgagor's motion to vacate final judgment of foreclosure. Mortgagors appealed. The District Court of Appeal, Lawrence, J., held that: (1) unpaid principal and interest were "liquidated damages," and mortgagors were not entitled to notice of hearing determining those amounts, and (2) mortgagors were entitled to notice of hearing on issue of attorney's fees.

Affirmed in part, reversed in part, and remanded.

1. Constitutional Law ⇐315

Defaulting party has due process entitlement to notice and opportunity to be heard as to presentation and evaluation of evidence necessary to judicial determination of amount of unliquidated damages. West's F.S.A. RCP Rule 1.440(c); U.S.C.A. Const.Amend. 14.

2. Damages ⇐193.1

Damages are "liquidated" when proper amount to be awarded can be determined with exactness from cause of action as pleaded, i.e. from pleaded agreement between parties, by arithmetical calculation or by application of definite rules of law; since every negotiable instrument must be unconditional promise or order to pay sum certain in money, actions for sums directly due on negotiable instruments are, by definition, actions for liquidated damages. F.S.1991, §§ 673.104(1)(b), 673.106.

See publication Words and Phrases for other judicial constructions and definitions.

3. Damages ⇐193.1

Damages are "unliquidated" if ascertainment of their exact sum requires taking of testimony to ascertain facts upon which to base value judgment.

See publication Words and Phrases for other judicial constructions and definitions.

4. Damages ⇐202

In foreclosure action against mortgagors, unpaid principal and interest were "liq-