IN THE SUPREME COURT OF FLORIDA

REGINALD LEETREZ GILYARD,

Petitioner,

v. CASE NO. 83,619

STATE OF FLORIDA,

Respondent.

_____/

DISCRETIONARY REVIEW OF DECISION OF THE
DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

ANSWER BRIEF OF RESPONDENT ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

Respondent submits that Petitioner's Statement of the case and Facts is accurate except for one allegation of fact. The Second District Court of Appeals reversed the sentences in both case 90-3068 (possession of cocaine) and case 90-3119 (Solicitation to purchase cocaine) for being beyond the statutory maximum of 5 years for third degree felonies.

SUMMARY OF THE ARGUMENT

The certified question of the Second District Court of Appeals should be answered in the negative. The case law relied upon by the defense is factually distinguishable. The prohibition against combining incarceration with community control sanctions is only prohibited in instances where the sentencing guidelines recommend a sentence of community control "or" incarceration. In the instant case, the guidelines sentencing recommendation were: Recommended range: 4 1/2 - 5 1/2 and a Permitted Range of 3 1/2 - 7 years imprisonment. Since there is no guidelines requirement that the court chose between what this court has termed to be "mutually exclusive" sentencing options, the sentences imposed in the instant case do not constitute departure sentences requiring written reasons.

The sentence imposed does not conflict with the committee note to Fla. R. Crim. Pro 3.701(d)(13) which requires written reasons if community control is imposed as an "alternative" to a state prison sentence greater than 24 months because the community control portion of the sentence was not imposed as an "alternative" to guidelines sentencing range of a minimum of 3 1/2 years but was imposed consecutive to a sentence of imprisonment. Furthermore, since the sentence imposed is within the incarceration period required by the guidelines but is less than the maximum state prison time available to the court, it is difficult to consider such a sentence a departure sentence.

ARGUMENT

ISSUE

DOES THE RULE IN STATE v. VANKOOTEN, 522 SO.2D 830 (FLA. 1988), APPLY IN THE SITUATION WHERE THE SENTENCING RANGES SPECIFIED BY THE GUIDELINES DOES NOT PROVIDE FOR SANCTIONS PHRASED IN THE DISJUNCTIVE BUT MERELY PROVIDES FOR A TERM OF YEARS? (RESTATED)

The rule enunciated in VanKooten v. State, 522 So.2d 830 (Fla. 1988) and further amplified in State v. Davis, 630 So.2d 159 (Fla. 1994) and Felty v. State, 630 So.2d 1092 (Fla. 1994) is not applicable to the instant case. All of these cases, upon which the Petitioner relies, are factually distinguishable. All of these cases involved defendants whose sentencing guidelines provided for imposition of "community control "or" 12 to 30 months incarceration" (VanKooten); a recommended range of "community control or 12 to 30 months incarceration " and a permitted range of "any nonstate prison sanction or one to 3 1/2 years incarceration" (Davis); and "community control or one to twelve years incarceration (Felty). See Gilyard v. State, 19 Fla. Law Weekly (d)809, n.6 (Fla. 2d DCA, April 22, 1994). This court reasoned in all these cases that the language of the sentencing guidelines by use of the word "or" meant that the sentencing alternatives were mutually exclusive.

In the instant case the sentencing guidelines provides for a recommended sentencing range of 4 1/2 to 5 1/2 years and a permitted range of 3 1/2 to 7 years (R182). As the Second District Court of Appeals reasoned:

> "Thus, the limitations on the court's sentencing authority presented by language phrased in the disjunctive, as in VanKooten, Collins, Davis, and Felty, are absent here. Since the sentencing court in the case before us had no VanKooten issue limiting it, it did not err in sentencing the Petitioner as it did." Gilyard, Id.

Petitioner argues that imprisonment and community are mutually exclusive options relying upon the 1988 Sentencing Guidelines Committee note to Rule 3. 701(d)(13) which provides:

> "Community control is a viable alternative for any state prison sentence less than twenty-four (24) months without requiring a reason for departure. It is appropriate to impose a sentence of community control to be followed by a term of probation. The total sanction (community control and probation) shall not exceed the term provided by general law."

Petitioner argues that since the bottom of the permitted range applicable to him is 3 1/2 years, this is beyond the 24 months for which community control could be substituted and is therefore a departure sentence requiring a written reason. Respondent submits that this argument lacks judicial merit in the instant case. Petitioner was not sentenced to community control as an "alternative" to a state prison sentence. He was sentenced to consecutive sanctions of 4 1/2 years imprisonment followed by 1 year community control followed by 1 year probation. The community control portion of his sentence was not a substitute for the minimum sentence 3 1/2 years imprisonment but was in addition to it. Since the community control portion of his

sentence was not substituted for the minimum 3 1/2 years required by the guidelines, it was not a departure sentence requiring written reasons pursuant to the committee note explaining 3.701(d)(13).

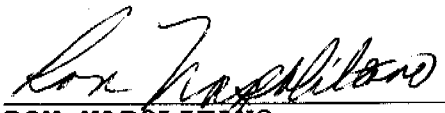
Since the sentence imposed is not the type of mutually exclusive sentencing alternatives prohibited by the guidelines as interpreted in VanHooten, Davis, and Felty, it is not a departure from the guidelines requiring written reasons. Furthermore, since the state imprisonment portion of the sentence imposed is within terms provided by the guidelines and yet less than the maximum incarceration that could have been imposed both under the recommended range and the permitted range, it is difficult , if not impossible, to consider the combined sanctions as being a departure sentence.

CONCLUSION

Based upon the foregoing facts, arguments and authorities, the certified question should be answered in the negative.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to Cynthia J. Dodge, Esq., Assistant Public Defender, P. O. Box 9000 Drawer PD, Bartow, Florida 33830, on this 28 day of June 1994.

OF COUNSEL FOR RESPONDENT