IN THE SUPREME COURT OF FLORIDA

REGINALD LEETREZ GILYARD,	:	
Petitioner,	:	
vs.	:	Case No. 83,619
STATE OF FLORIDA,	:	
Respondent.	:	
	:	

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

INITIAL BRIEF OF PETITIONER ON THE MERITS

JAMES MARION MOORMAN
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TENTH JUDICIAL CIRCUIT

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STATEMENT OF THE CASE AND FACTS

On July 6, 1990, in Case No. 90-9751, the State Attorney for the Thirteenth Judicial Circuit in and for Hillsborough County, Florida, filed an information against the Appellant, REGINALD GILYARD, charging him with solicitation to purchase cocaine in violation of sections 893.03 and 777.04(2), Florida Statutes (1989). The offense is a third-degree felony and was committed on June 19, 1990.

On January 29, 1991, in Case No. 90-17548, the State filed an information charging the Petitioner with possession of cocaine in violation of section 893.13(1)(f), Florida Statutes (1989). The date of the alleged offense was November 15, 1990.

On March 7, 1991, in Case No. 91-2527, the State filed an information charging the Petitioner with the robbery of Damone Dixon with a firearm and the robbery of Vincent Williams with a firearm in violation of section 812.13(1) and (2)(a), Florida Statutes (1989). The date of the alleged offense was February 4, 1991. On June 13, 1991, in the same case, the State filed a supersedes information which omitted the co-defendant, James Lee Brock.

The State filed a supercedes information in Case No. 91-2535 on May 10, 1991, charging Mr. Gilyard with attempted felony murder with a firearm in violation of sections 777.04 and 782.04(1), Florida Statutes (1989), and robbery with a firearm.

On July 15, 1991, the Petitioner pleaded guilty in all of the above cases. In Case No. 91-2535, the State agreed to enter a

nolle prosequi of the charge of attempted felony murder and reduced the charge of armed robbery to strong armed robbery.

On August 20, 1991, Mr. Gilyard was sentenced by the Honorable Edward H. Ward. In Case No. 91-17548, the court sentenced Mr. Gilyard to four years imprisonment to be followed by one year community control for possession of cocaine. In Case No. 91-2527, the court sentenced the Petitioner on both counts of armed robbery to four years imprisonment, with a three-year minimum mandatory for the firearm, to run concurrently to be followed by one year of community control and one year of probation. The sentence was to run concurrent with the sentences in the other cases. The Petitioner was also ordered to pay a total of $345 in restitution.

In Case No. 90-9751, the court sentenced Mr. Gilyard for solicitation to purchase cocaine to four years imprisonment, to be followed by one year of community control and one year of probation. In Case No. 91-2535, Mr. Gilyard was sentenced for the lesser included offense of strong arm robbery in Count II. (The state had previously entered a nolle prosequi of the charges in Count I.) In 91-2535, the court sentenced the Petitioner to four years imprisonment followed by one year community control, to be followed by one year probation for strong arm robbery.

The guidelines recommended 4 1/2 to 5 1/2 years imprisonment with a permitted range of 3 1/2 to 7 years imprisonment. The Petitioner filed separate notices of in each case on September 19, 1991.

On April 22, 1994, the Second District Court of Appeal filed an opinion in this case. The district court corrected the sentencing error in Case No. 90-9751 in which Petitioner was sentenced to a total of six years for the third-degree felony, solicitation to purchase cocaine. The court upheld the remainder of Mr. Gilyard's sentence, but certified the following question:

> DOES THE RULE IN State v. VanKooten, 522 So. 2d 830 (Fla. 1988), APPLY IN THE SITUATION WHERE THE RANGE DOES NOT PROVIDE SANCTIONS PHRASED IN THE DISJUNCTIVE BUT MERELY PROVIDES FOR A TERM OF YEARS?

SUMMARY OF THE ARGUMENT

The certified question of the Second District Court of Appeal should be answered in the affirmative. The Petitioner's presumptive guidelines range was 3 1/2 to 7 years imprisonment. Such a range does not include community control as an alternative to incarceration. Furthermore, this Court has ruled in State v. VanKooten, 522 So. 2d 830 (Fla. 1988), that when the presumptive guidelines sentence directs community control or incarceration, the imposition of both represents a departure from the sentencing guidelines, requiring proper written reasons for the departure. It is also a departure when the presumptive range does not include community control.

ARGUMENT

ISSUE

DOES THE RULE IN State v. VanKooten, 522 So. 2d 830 (Fla. 1988), APPLY IN THE SITUATION WHERE THE RANGE DOES NOT PROVIDE SANCTIONS PHRASED IN THE DISJUNCTIVE BUT MERELY PROVIDES FOR A TERM OF YEARS?

The Petitioner's sentencing guidelines for these cases recommended 4 1/2 to 5 1/2 years imprisonment with a permitted range of 3 1/2 to 7 years imprisonment. In Case No. 91-2527, the court sentenced the Petitioner on both counts of armed robbery to four years imprisonment, with a three-year minimum mandatory for the firearm, to run concurrently, to be followed by one year of community control and one year of probation.

In Case No. 90-9751, the court sentenced Mr. Gilyard for solicitation to purchase cocaine to four years imprisonment, to be followed by one year of community control and one year of probation. In Case No. 91-2535, Mr. Gilyard was sentenced for strong arm robbery to four years imprisonment followed by one year community control, to be followed by one year probation.

The Florida Supreme Court recently decided in Felty v. State, 630 So. 2d 1092 (Fla. 1994), that the sentencing guidelines clearly state that the presumptive sentence in the second cell is community control or incarceration, and that the alternatives are mutually exclusive. Any change in this sentencing structure must occur through appropriate legislative and court rule action. The court specifically stated that the holding is not different even if the

combined sentences of imprisonment and community control do not exceed the presumptive range. In Felty, unlike in this case, the defendant's guidelines scoresheet permitted range included community control. In this case the permitted range was 3 1/2 to 7 years imprisonment.

In State v. Davis, 630 So. 2d 1059 (Fla. 1994), this Court held that combining nonstate prison sanctions, county jail time, community control, (and probation), constitute a departure sentence for which written reasons must be given. The Davis court also quotes State v. VanKooten, 522 So. 2d 830 (Fla. 1988), saying "that when the presumptive guidelines sentence directs community control or incarceration, the imposition of both represents a departure from the sentencing guidelines, requiring proper written reasons for the departure." Davis. In this case, the presumptive guidelines did not recommend community control.

In this case, the trial court sentenced the Petitioner to state prison, followed by community control, followed by probation. Clearly, this is a departure sentence which must be accompanied by written reasons which were absent in this case. Petitioner also points out to this Court that the total sentence in case no. 91-9751 is six years, which exceeds the statutory maximum for a third-degree felony, which was corrected on appeal to the Second District.

In Skeen v. State, 556 So. 2d 1113 (Fla. 1990), the trial court sentenced the defendant to two years community control to be followed by ten years probation for a second-degree felony, felon

in possession of a firearm. The defendant argued the stacking of community control and probation was improper. This Court held that community control and probation could be stacked based on the committee noted to Florida Rule of Criminal Procedure 3.701(d)(13), which specifically permits the imposition of a sentence of community control to be followed by probation.

The 1988 Sentencing Guidelines Commission Notes to Rule 3.701(d)(13) state:

> Community control is a viable alternative for any state prison sentence less than 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....

The committee notes provide that community control is only an alternative to a state prison sentence less than 24 months without requiring a reason for departure. Clearly, the bottom of Petitioner's permitted range of 3 1/2 years is beyond the 24 months for which community control could substitute. Furthermore, the court chose to impose a prison sentence in addition to the community control. The sentences of four years to be followed by one year community control and one year probation was clearly a departure sentence for which no written reasons were provided. For that reason, Petitioner's sentence must be reversed.

CONCLUSION

Based on this Court's decision in VanKooten, the certified question submitted by the Second District Court of Appeal should be answered in the affirmative and Mr. Gilyard's case should be remanded for resentencing.

APPENDIX

PD

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

REGINELL LEETREZ GILYARD a/k/a REGINALD LEETREZ GILYARD,	)	
Appellant,	)	
v.	)	Case Nos. 91-03068
	)	91-03070
STATE OF FLORIDA,	)	91-03117
	)	91-03119
Appellee.	)	
	)	CONSOLIDATED

Opinion filed April 22, 1994.

Appeal from the Circuit Court for Hillsborough County; Edward H. Ward, Judge.

James Marion Moorman, Public Defender, and Cynthia J. Dodge, Assistant Public Defender, Bartow, for Appellant.

Robert A. Butterworth, Attorney General, Tallahassee, and Carol M. Dittmar, Assistant Attorney General, Tampa, for Appellee.

DANAHY, Acting Chief Judge.

In these consolidated appeals we review the sentencing scheme imposed upon the appellant for convictions of possession of cocaine,[1] solicitation to purchase cocaine,[2] strong arm

[1] § 893.13(1)(f), Fla. Stat. (1989) (third degree felony).

[2] §§ 893.13 and 777.04(2), Fla. Stat. (1989) (third degree felony).

robbery,[3] and two counts of armed robbery.[4] Appellant contends (1) that the sentences for the drug crimes are beyond the statutory maximums for those third-degree felonies and (2) that the sentences imposed for each of the five crimes are illegal under State v. VanKooten, 522 So. 2d 830 (Fla. 1988). We agree with the first contention but not the second. Accordingly, we affirm in part and reverse in part.

In Case No. 90-03068 and in Case No. 90-03119, the appellant was convicted of possession of cocaine and solicitation to purchase cocaine respectively. These crimes are third-degree felonies which carry a statutory maximum of five years.[5] For these convictions the trial court imposed concurrent terms of four years' incarceration, followed by one year community control, followed by one year probation, for a total punishment of six years. This is clearly beyond the statutory maximum and cannot stand. State v. Holmes, 360 So. 2d 380 (Fla. 1978).

This sentencing scheme, four years' incarceration followed by one year community control followed by one year probation, was repeated for each of the other crimes for which the appellant was convicted. The appellant's guidelines recommended range was 4½ to 5½ years' incarceration and his permitted range was 3½ to 7 years' incarceration. The appellant contends that

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[3] § 812.13(1) and (2)(c), Fla. Stat. (1989) (second degree felony).

[4] § 812.12(1) and (2)(a), Fla. Stat. (1989) (first degree felony punishable by life in prison).

[5] § 775.082(3)(d), Fla. Stat. (1989).

this sentencing scheme violates the rule in VanKooten. VanKooten requires that when a defendant's recommended guidelines range is incarceration or community control to sentence the defendant to incarceration and community control is a departure for which written reasons must be filed. Since the appellant received both incarceration and community control, he argues each of these sentences is illegal since the trial court filed no written reasons. During the pendency of this appeal our supreme court decided State v. Davis, 630 So. 2d 1059 (Fla. 1994), and Felty v. State, 630 So. 2d 1092 (Fla. 1994). In these cases the court found it necessary to reaffirm the rule in VanKooten because of the varying interpretations the district courts had given it. See Collins v. State, 596 So. 2d 1209 (Fla. 1st DCA 1992), disapproved in State v. Davis, 630 So. 2d 1059 (Fla. 1994); and Felty v. State, 616 So. 2d 88 (Fla. 2d DCA 1993), quashed, 630 So. 2d 1092 (Fla. 1994).

The court noted in Felty that the factor that had caused several of the district courts to stray from strict adherence to the VanKooten rule was a combination of incarceration and community control which did not exceed the permitted range of the guidelines. The court explained, however:

> While there is no doubt that the length of the combined sentences of imprisonment and community control exceeded the guideline range in VanKooten, this was not the basis upon which the case was decided. In our opinion, we rejected the rationale of Francis v. State, 487 So. 2d 348 (Fla. 2d DCA 1986), which held that the use of the word "or" in the guideline provision for "community

> control or twelve to thirty months[']
> incarceration" was not intended to make the
> alternatives mutually exclusive but rather
> was designed to permit the imposition of
> either or both sanctions. VanKooten, 522
> So. 2d at 831. We held that the sentencing
> guidelines clearly stated that the presump-
> tive sentence was community control *or*
> incarceration and that any change must occur
> through appropriate legislative and court
> rule action. Id. There is nothing in our
> opinion which suggests that our holding would
> have been different if the combined sentences
> of imprisonment and community control had not
> exceeded the presumptive range.
>
> We reaffirm our opinion in VanKooten
> that where the sentencing guidelines specify
> incarceration *or* community control, these
> alternatives are mutually exclusive.

Felty, 630 So. 2d at 1093.

The court's clearly stated rationale, i.e., that when the statute and the rule read "incarceration or community control" they mean or, persuades us that the instant case is distinguishable from VanKooten, Davis, Collins, and Felty. In each of these cases the recommended or permitted guidelines range allowed incarcerative and nonincarcerative sentencing, phrased in the disjunctive.[6] This is what the supreme court

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[6] In VanKooten, the recommended range was community control or 12 to 30 months' incarceration; there was no permitted range as of the date the crime there was committed. In Collins, the recommended range was any nonstate prison sanction and, because the sentencing was on a violation of probation which allowed the sentencing court to bump-up one cell, that next cell provided for a recommended range of community control or 12 to 30 months' incarceration and a permitted range of any nonstate prison sanction or community control or 1 to 3½ years' incarceration. In Davis, the recommended range was community control or 12 to 30 months' incarceration and the permitted range was any nonstate prison sanction to 3½ years' incarceration. In Felty, the permitted range was community control or 1 to 12 years' incarceration.

found controlling. In Davis, the supreme court interpreted paragraphs (d)(8) and (d)(13) of the commission notes to Florida Rule of Criminal Procedure 3.701 and concluded that the punishment alternatives of nonstate prison sanctions (which include county jail time), community control, and incarceration are disjunctive sentencing alternatives. Combining any or all of them creates a departure sentence for which written reasons must be given. The facts in Felty were practically the same except that the incarceration called for by the guidelines was in state prison, not county jail.

The case before us is different. Neither the appellant's recommended range nor his permitted range was phrased in the disjunctive. His recommended range was 4½ to 5½ years' incarceration and his permitted range was 3½ to 7 years' incarceration. Thus, the limitations on the court's sentencing authority presented by language phrased in the disjunctive, as in Van Kooten, 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 appellant as it did.

In summary, we reverse the sentences for the two third-degree felonies and remand for resentencing within the statutory maximum for those convictions; otherwise the sentences are affirmed. We certify the following question as being one of great public importance:

> DOES THE RULE IN State v. VanKooten, 522 So. 2d 830 (Fla. 1988), APPLY IN THE SITUATION WHERE THE RANGE DOES NOT PROVIDE

SANCTIONS PHRASED IN THE DISJUNCTIVE BUT MERELY PROVIDES FOR A TERM OF YEARS?

BLUE and FULMER, JJ., Concur.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Robert Butterworth, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4730, on this 7th day of June, 1994.

Respectfully submitted,

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