IN THE SUPREME COURT
STATE OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v. Case No. 83,786

FLETCHER BERRY

Respondent

_____/

Discretionary Review of Decision of
the District Court of Appeal,
Second District of Florida

BRIEF OF PETITIONER ON THE MERITS

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

ANNE Y. SWING
Assistant Attorney General
Florida Bar No. 0299294
Westwood Center, 7th Floor
Criminal Division
2002 N. Lois Avenue
Tampa, Florida 33607
(813) 873-4739

COUNSEL FOR PETITIONER

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STATEMENT OF THE CASE AND FACTS

The State is seeking review of the Second District opinion appended based on a certified question. The facts and proceedings were as follows:

Fletcher Berry, Respondent herein and Appellant below, was accused of possessing cocaine in February 18, 1992, at which time he was seventeen years old. He was charged by direct information filed on March 19, 1992. (R. 4-5,6) He had a number of assorted previous convictions, including two felonies, one of which was sexual battery. (R. 14) He was represented by counsel and by a guardian ad litem who was also an attorney. (R. 9, 10-11, 34, 69).

His father considered him too dangerous to be on the streets. He advised the judge that he could not control him, that he refused to do what anyone told him, and that he often stayed with his aunt, who would cover for him, hide him, and got him to sell cocaine for her. (R. 71-75). Respondent personally confirmed that he would not let people tell him what to do and said that he sold cocaine for his "own self," not because his aunt told him to. (R. 14).

Respondent filed a motion to suppress the cocaine found in his possession on June 1, 1992, which was heard and denied on June 4, 1992. (R. 7-8, 31-62). After the evidence was presented and the judge's ruling announced, there was a break in the proceedings and he conferred with defense counsel and his

guardian ad litem. The judge was then advised that he wanted to enter a no contest plea, reserving the right to appeal the suppression issue, and that he would be requesting a sentence of adult probation. A plea form and waiver of juvenile sentencing had apparently been executed during the break by Respondent, defense counsel, and the attorney acting as his guardian. (R. 9, 10-11, 62) No one was sure what the correct guidelines range was because there were alias convictions the preliminary scoresheet did not reflect and other charges that might have been resolved in the meantime. Therefore, sentencing was scheduled for June 10, 1992 in order for a correct scoresheet to be prepared. Respondent reserved the right to withdraw his plea then if he thought the new scoresheet made that advisable, and the plea colloquy was deferred until then. (R. 62-65) The waiver of juvenile sentencing, which is quoted in full in the court's opinion, explains the specific rights being waived and confirms under oath that the juvenile has been advised of them and understands them. The waiver indicates that he swore to this in the judge's presence before she signed it although that was not reported. (R. 9)

At the sentencing hearing, defense counsel reminded the judge that the plea had been postponed a week to obtain a correct scoresheet and advised her that the new scoresheet was somewhat higher, recommending community control and permitting up to three and one-half years in prison. He explained that the new scoresheet had been discussed with Respondent and that he was

gong to proceed with the plea and sentencing on that basis. He also reminded her that Respondent had already executed a written plea and waived juvenile sanctions the previous week in the presence of counsel and his appointed guardian. (R. 69)

In the plea colloquy which followed, the judge ascertained that Respondent could read with no difficulty, that he had read the plea form and he understood the rights he was giving up, that he knew what the possible potential sanctions were, and that he understood that she was free to impose whatever sentences she thought best. (R. 70) Defense counsel and Respondent both advised the judge that he was requesting a prison term, preferably shorter than the three and one-half years which the guidelines permitted, rather than community control. (R. 71) The theory, essentially, was that he was too averse to discipline to be expected to comply with the terms and had no suitable place to serve house arrest, which his father confirmed as previously noted.

The judge, however, concluded that he would benefit more by learning discipline and respect for the rules then he would by spending time in prison and placed him on two years' community control followed by three years' probation anyway, with a condition requiring him to spend the first year in jail and work on obtaining his G.E.D., which he indicated he could obtain. (R. 16-17, 18-20, 75-76) After more thought, she ordered him to report to the probation and restitution center upon his release from the jail because his family could not handle him and had

given up trying, and she wanted to prevent him from spending his life in and out of prison, which she explained. (R. 20, 76-79) She made provision for him to be released from the jail when he obtained his G.E.D. The requirement for residing at the probation and restitution center was to end whenever his behavior made it appropriate to discharge him, and each would be limited to a year at the most. (R. 20, 76, 78)[1]

The notice of appeal was filed timely on June 18, 1992. (R. 21-22) Defense counsel filed a no merit brief under Anders v. California, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967), discussing the suppression issue reserved for appeal and a possible sentencing argument. The State agreed with defense counsel's analysis, and Respondent did not file a brief pro se. The Second District, however, ordered briefing on two issues noted in its independent review: (1) whether ordering Appellant to reside at the probation and restitution center after being released from the jail constituted incarceration for more than a year under Solis v. State, 622 So. 2d 587 (Fla. 2d DCA 1993); and (2) whether the written findings required by Troutman v. State, 630 So. 2d 528 (Fla. 1993), were required to support the adult sentencing. The court ultimately reversed on both grounds,

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[1] The undersigned is advised that Respondent was in fact released from the jail into the custody of the probation and restitution center on January 5, 1993 and wound up in prison a few months later. The specifics were not provided.

dealing with the first summarily discussing the second at length, and certifying the following question as follows:

> DOES TROUTMAN V. STATE, 630 SO. 2D 528 (FLA. 1993), OVERRULE THE HOLDINGS OF STATE V. RHODEN, 448 SO. 2D 1013 (FLA. 1984), AND SIRMONS V. STATE, 620 SO. 2D 1279 (FLA. 1993), THAT A JUVENILE MAY WAIVE THE
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> STATUTORILY MANDATED REQUIREMENTS OF SECTION 39.059(7), FLORIDA STATUTES (1991), SO LONG AS SUCH A WAIVER IS VOLUNTARILY, KNOWINGLY, AND INTELLIGENTLY WAIVED?

In addition, certain discretionary cost awards were reversed without prejudice to reimposing them after notice and a hearing. That issue had not been argued and was dealt with in a footnote.

SUMMARY OF THE ARGUMENT

ISSUE I - The certified question should be answered in the negative, and the adult sentencing approved. The Court has made it clear that juvenile sentencing can be waived voluntarily as long as the juvenile is informed of the specific rights he is giving up, and Respondent was. The opinions stating that have not been overruled. On the contrary, they served as the basis for the decision said to overruled them. There was no reason to discuss the possibility of waiver again in that case because it was not an issue there.

ISSUE II - The requirement for residing in the probation and restitution center after Respondent spent time in jail should also be approved because it was a matter of necessity, not punishment. He had no suitable place to live while on community control otherwise. Furthermore, a year was the maximum time he could spend in each facility. How much of that he actually spent was up to him.

ARGUMENT

ISSUE I

DOES TROUTMAN V. STATE, 630 SO. 2D 528 (FLA. 1993), OVERRULE THE HOLDINGS OF STATE V. RHODEN, 448 SO. 2D 1013 (FLA. 1984), AND SIRMONS V. STATE, 620 SO. 2D 1279 (FLA. 1993), THAT A JUVENILE MAY WAIVE THE STATUTORILY MANDATED REQUIREMENTS OF SECTION 39.059(7), FLORIDA STATUTES (1991), SO LONG AS SUCH A WAIVER IS VOLUNTARILY, KNOWINGLY, AND INTELLIGENTLY WAIVED? (CERTIFIED QUESTION)

The State of Florida, Petitioner herein, would respectfully submit that Troutman v. State, 630 So. 2d 528 (Fla. 1993), clearly does not overrule Rhoden v. State, 448 So. 2d 1013 (Fla. 1984), and Sirmons v. State, 620 So. 2d 1249 (Fla. 1993); that those opinions govern the issue presented; and that Troutman is totally consistent but basically irrelevant. The Second District panel incorrectly reached the opposite conclusion by focusing on portions of the discussions in Troutman without considering the context in which the statements were made.

Rhoden considered the question of whether the failure to object to being sentenced as an adult without the statutory findings waived the requirement, and the Court determined that it did not, noting that juveniles have a right to be sentenced differently, which the findings are necessary to protect, and that they are always required absent a deliberate, knowing waiver. 448 So. 2d at 1017. Sirmons considered the question of whether a plea agreement which provides for adult sentencing obviates the need

for findings. The Court determined that it did not because, in order for the right of a juvenile tried as an adult to be treated as a juvenile for sentencing to be knowingly and intelligently waived, the juvenile has to know what protections he is giving up. The record did not show that the defendant in that case had not been informed of those rights. 620 So. 2d at 1252.

In Troutman, there was no contention that the right to be treated as a juvenile had been waived or that findings were unnecessary for any other reason. They were unquestionably necessary and the judge had in fact made both oral and written findings. The question was whether they were sufficient, because the judge had neither addressed all of the statutory factors specifically nor reduced his findings to writing contemporaneously. The Court determined that this was not sufficient because the juvenile's right to be treated as such made strict compliance with Section 39.059(7), Florida Statutes, mandatory, at least where the juvenile had been charged by direct information and findings therefore had not been required in order to try him as an adult in the first place. 630 So. 2d at 531 n.5.

This is not inconsistent with Rhoden and Sirmons in any respect. All three cases stress the importance of protecting the rights of juveniles tried as adults to be treated as juveniles for purposes of sentencing, and the requirement for strict compliance with Section 39.059(7) in making the necessary findings which Troutman states is expressly based on Rhoden and Sirmons.

Troutman did not mention the possibility of a knowing waiver as Rhoden and Sirmons did for the obvious reason that waiver was not an issue in Troutman as it was in Rhoden and Sirmons. When findings are necessary and what they must include are two different questions, and Troutman dealt solely with the latter because the answer to the former was clear and undisputed.

The Second District panel apparently overlooked this distinction as well as the fact that Rhoden and Sirmons, far from being questioned in Troutman were cited as the primary authority for determining that the findings must strictly comply with Section 39.059(7) in order to protect the juvenile's right to be treated as such for sentencing. Interpreting a decision regarding the sufficiency of findings where they are clearly required so as to require findings in situations not before the Court is questionable, inferring a requirement for findings where the Court has twice stated they would not be required is even less logical, and interpreting an opinion to overrule the very cases it relies on certainly makes no sense.

Moreover, the idea that the right to be treated as a juvenile at sentencing could not be waived at all was considered by this Court and rejected when Sirmons was decided. Justice Barkett suggested precisely that in her concurrence, and the rest of the Court obviously disagreed as the majority opinion expressly confirms the statement in Rhoden that a knowing waiver would obviate the need for findings, and no one joined in the concurrence which questioned that. 620 So. 2d at 1252. The

opinion in the instant case does not mention the fact that the conclusion reached was considered and rejected in Sirmons either. It appears that Troutman was found to require findings where the right to be treated as a juvenile is knowingly waived simply because that possibility was not mentioned and the fact that there was no reason to discuss that in resolving the case at issue was overlooked.

The waiver in this case was clearly knowing and intelligent and made findings unnecessary under the test established in Sirmons because the record shows that Respondent, unlike the defendant in Sirmons was informed of the specific rights he would have in a juvenile sentencing and waived them deliberately. They were set out in the written waiver he executed on June 4, 1992, and he swore under oath that he had been advised about them and understood them. Although the June 4 transcript does not show the event, it apparently occurred in the presence of the judge since she signed it to indicate that it had. (R. 9) Respondent could read with no difficulty, and anticipated being able to obtain his G.E.D. (R. 70, 76) Moreover, he was represented by a guardian ad litem who was an attorney as well as defense counsel, and both were present and signed the waiver as well. (R. 9, 10-11, 34, 67).

There was no reason to discuss the waiver when his plea was accepted on June 10, 1992, because the waiver was not part of the plea. There was no agreement regarding the sentence at all. (R. 70) Respondent was seventeen years old when this offense was committed, and it was not his first. (R. 5,6,14) On the other

hand, his guidelines range was not high. (R. 14) He was hoping to receive either adult probation or a prison sentence of something less than the three and one-half years the guidelines permitted and presumably waived juvenile sentencing for that reason. (R. 62, 71).

Possibly he did so to avoid further participation in juvenile programs. Possibly he expected the judge to sentence him as an adult in any event and thought he might better his chances of getting his choice of adult sentences if he affirmatively requested such sentencing from the outset. Whatever his reasons for waiving the right to have juvenile sanctions considered, he was clearly informed of the specific rights he was giving up, he had two attorneys advising him and protecting his interests independently, he swore he understood his juvenile rights, and he would have known what they were from his previous cases anyway. It might be preferable for a discussion to be included in the transcript, but the fact that the waiver was knowing and intelligent is clear without that, and findings were therefore unnecessary.

ISSUE II

WHETHER ORDERING RESPONDENT TO RESIDE IN THE PROBATION AND RESTITUTION CENTER AFTER SERVING JAIL TIME CONSTITUTED A TERM OF INCARCERATION EXCEEDING A YEAR SO AS TO BE IMPERMISSIBLE UNDER THE PARTICULAR CIRCUMSTANCES.

The State acknowledges that requiring residence in a probation and community control center is generally considered an incarcerative sentence, and that coupling it with a requirement for jail time can result in an impermissible term of incarceration when the total exceeds one year as the Second District held in Solis v State, 622 So. 2d 484 (Fla. 2d DCA 1993). The State questions the application of that rule on these facts, however, for two different reasons.

In the first place, Respondent was not being required to spend more than a year in the jail and the center combined. The amount of time he spent in each program was within his control. He would be released from the jail as soon as he obtained his G.E.D., which he indicated would not be a problem, and he could be discharged from the center at any time it was determined to be appropriate. (R. 75-76, 20) The effect of the judge's order was actually to ensure that he did not spend more than a year in either. Letting Respondent himself determine how much time he would spend in jail and the probation center was obviously an excellent way to encourage him to grow up and act responsibly, and, in the State's view, the fact that he could potentially spend a year in each place did not require him to spend more than a year

altogether since the terms he actually spent were within his control.

Another problem with the ruling in the State's view is that Respondent was not ordered to reside in the probation center as additional punishment. That provision was added as an afterthought because it was clear from his father's comments and defense counsel's argument that there was nowhere suitable for him to live unless and until his attitude and behavior changed. His family could not handle him and had given up trying. His father considered him too dangerous to be on the streets at all. (R. 71-75) When he stayed with his aunt, she encouraged him to sell drugs and otherwise act irresponsibly. (R. 73-74) Defense counsel stressed the impracticality of house arrest as a reason for imposing a brief prison sentence instead as Respondent was requesting. (R. 71)

That is hardly an uncommon preference for defendants in the lower guidelines ranges since they are likely to serve a few months at most, while community control will last longer and require more of them besides. Defendants clearly do not have a right to reject probation and community control in favor of prison sentences. Judges can impose whichever type of sentence they consider most appropriate. See e.g., Morgani v. State, 573 So. 2d 820, 822 (Fla. 1991); Petrillo v. State, 554 So. 2d 1227 (Fla. 2d DCA 1990); Woods v. State, 542 So. 2d 443 (Fla. 5th DCA 1989).

As the judge explained to Respondent, a brief stay in prison would do him no good. If he did not develop some discipline and

responsibility, he would be spending much of his adult life there. Putting him under close supervision, combined with incentives, on the other hand, would hopefully encourage appropriate behavior as he gained in maturity and keep that pattern from developing. (R. 77-78) She obviously thought that a period in jail at the outset would be beneficial, presumably to get his attention and keep him out of trouble for a while as well as to provide an incentive for getting his G.E.D. quickly in order to be released. He obviously had to have somewhere to live after that, however, and there was no practical option other than the probation center, which is why she sent him there. If he showed he could act responsibly and was discharged, he could presumably go back and live with his family again, but in the meantime, his father obviously did not want him there.

The State would submit that having a supervisee live in the probation center because he has no suitable place to live otherwise is not an incarcerative sentence. Rather, it is a matter of necessity and therefore not subject to a one-year limit where the necessity continues beyond that. Otherwise, defendants who want to complete their sentences the easy way by spending a brief time in prison could often force judges to impose such a sentence where supervision is deemed more appropriate, simply by putting on evidence that they will have no suitable place to live after the first year.

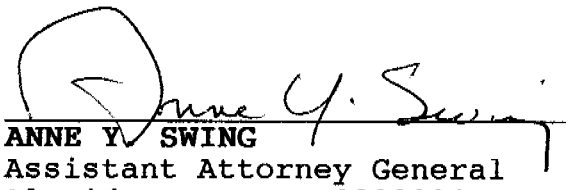
CONCUSION

For the reasons heretofore stated, the certified question should be answered in the negative, the trial court's actions approved, and the district court's decision reversed.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

ROBERT J. KRAUSS
Sr. Assistant Attorney General
Chief of Criminal Law Tampa
Florida Bar No. 238538
Westwood Center, Suite 700
2002 N. Lois Avenue
Tampa, Florida 33607-2366
(813) 873-4739



ANNE Y. SWING
Assistant Attorney General
Florida Bar No. 0299294
Westwood Center, Suite 700
2002 N. Lois Avenue
Tampa, Florida 33607-2366
(813) 873-4739
COUNSEL FOR PETITIONER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to Megan Olson, Assistant Public Defender, Polk County Courthouse, P.O. Box 9000 - Drawer PD, Bartow, Florida 33830 on this 18th day of July, 1994.

OF COUNSEL FOR PETITIONER