IN THE SUPREME COURT OF FLORIDA

GEORGE SINKS,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

CASE NO. 84,832

PETITIONER'S INITIAL BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner was the defendant in the trial court and the Appellant in the Fourth District Court of Appeal. He will be referred to as petitioner in this brief.

The record on appeal is consecutively numbered. All references to the record will be by the symbol "R" followed by the appropriate page number in parentheses.

STATEMENT OF THE CASE AND FACTS

Petitioner, George Sinks, is here on discretionary review from the Fourth District Court's affirmance of his sentence of four years imprisonment followed by two years community control, followed by 8 years probation. Petitioner's guideline permissive range was two-and-a-half to five-and-a-half years imprisonment. On rehearing, the district court held that it was not a sentencing guideline error to impose a sentence of community control and incarceration unless petitioner scored in a sentencing guideline range which presented community control or incarceration as disjunctive sentencing alternatives. Sinks v. State, 19 Fla. L. Weekly D2313 (Fla. 4th DCA 1994) (Appendix 1). The district court cited as authority the decision in Gilyard v. State, 636 So. 2d 134 (Fla. 2d DCA 1994), pending review on a certified question, Supreme Court case number 83,619.

SUMMARY OF ARGUMENT

Petitioner's guideline range is two-and-a-half to five-and-a-half years incarceration as a one cell bump up for violation of community control from an original cell of community control to four-and-a-half years. In State v. VanKooten, 522 So. 2d 830 (Fla. 1988), this Court held "that when the presumptive guideline sentence directs community control or incarceration, the imposition of both represents a departure from the sentencing guidelines, requiring proper written reasons for the departure." Later in State v. Davis, 630 So. 2d 1059 (Fla. 1994), this Court re-affirmed and clarified VanKooten and stated that community control and incarceration are disjunctive sentences which constitute a guideline departure for which written reasons must be given.

In any event, the sentence here of four years imprisonment followed by two years community control is excessive, by six months, of the maximum period of incarceration that the court could impose. State v. Davis, supra. When the court sentences a defendant to a period of prison and community control and his total term exceeds the upper permitted sentence, it is a departure sentence requiring the court to enter an order of departure. No such order of departure was entered here. Accordingly, the sentence must be reversed and remanded consistent with Davis and VanKooten.

ARGUMENT

THE SENTENCING RULE IN STATE V. DAVIS THAT IMPOSITION OF INCARCERATION AND COMMUNITY CONTROL ARE A DEPARTURE SENTENCE REQUIRES REVERSAL OF APPELLANT'S SENTENCE OF FOUR YEARS IMPRISONMENT, TWO YEARS COMMUNITY CONTROL AND EIGHT YEARS PROBATION WHERE THE TOP OF THE PERMITTED RANGE IS FIVE-AND-A-HALF YEARS INCARCERATION.

Petitioner's sentencing guidelines for this case on a violation of community control provided a permitted sentencing range of two-and-a-half to five-and-a-half years incarceration. The sentencing court imposed a sentence of four years imprisonment to be followed by two years community control and eight years probation. This is a departure sentence without written reasons. When a court sentences a defendant to a period of prison and community control whose total terms exceed the upper permitted sentence, it is a departure sentence requiring the court to enter an order of departure. State v. Davis, 630 So. 2d 1059 (Fla. 1994); Betancourt v. State, 550 So. 2d 1121 (Fla. 3d DCA), reversed in part 552 So. 2d 1107 (Fla. 1989) (sentence of four years in prison followed by two years community control was departure where upper permitted sentence was four-and-a-half years). Jones v. State, 582 So. 2d 184 (Fla. 4th DCA 1991). Since the total of six years (four years incarceration and two years community control) imposed by the sentencing court exceeds the five-and-a-half year upper permitted sentence, petitioner's sentence must be reversed for a sentencing within the guidelines or entry of a valid departure order.

Also, in State v. Davis, 630 So. 2d at 1060, this Court specifically held that incarceration and community control con-

stitute a departure sentence for which written reasons must be given:

> Thus, nonstate prison sanctions, which include county jail time, community control, and incarceration are disjunctive sentences. Combining any or all of them creates a departure sentence for which written reasons must be given.

The Davis opinion also quoted State v. VanKooten, 522 So. 2d 830 (Fla. 1988), saying "that when the presumptive guideline 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, supra. It is this language in Davis which led Judge Stone to dissent from the Fourth District's decision below, concluding that Davis applies to the sentence imposed here. Nor is there anything about the language used in Davis which limits its holding only to the second cell sentencing guideline range of community control or 12 to 30 months incarceration. Davis clarified that ambiguity from VanKooten. Thus, the decision of the Second District in Gilyard v. State, 636 So. 2d 134 (Fla. 2d DCA 1994), limiting Davis to only sentences imposed under guidelines second cell is incorrect. The Fourth District followed Gilyard in petitioner's case even though the state specifically agreed with petitioner that his sentence was a departure under Davis and that reversal for a new sentencing was required. The Fourth District's decision noted:

ON MOTION FOR REHEARING

> (PER CURIAM.) Having affirmed the trial court's revocation of community control and the sentence it imposed thereafter, notwithstanding both parties' contentions that we may

> have overlooked their supplemental briefs in which they agree we are bound by *State v. Davis*, 630 So. 2d 1059 (Fla. 1994), and *State v. VanKooten*, 522 So. 2d 830 (Fla. 1988), we deny appellant's motion for rehearing.

(Appendix - 1).

Thus, the state has conceded that Davis prohibits imposition of a sentence of incarceration and community control. The state must be precluded from asserting any other position to this Court not advanced below.

Davis was properly followed and applied by the Fifth District in Knepfer v. State, 635 So. 2d 160 (Fla. 1994), which held that a sentence of ten years incarceration followed by two years community control and then three years probation was a departure from guidelines where the defendant's maximum permitted range was 12 years.

In this case, the trial court sentenced the petitioner to state prison, followed by community control, followed by probation. This is a departure sentence for two reasons: 1) One, the total of community control and state prison exceeds the upper permissive range of five-and-a-half years incarceration allowed; and 2) it is a departure for Davis states that imposition of both community control and incarceration requires proper written reasons for departure.

CONCLUSION

Based on this Court's decision in State v. Davis, petitioner's sentence is a guideline departure for which no written reasons were given, accordingly, the sentence should be reversed and remanded for sentencing within the guidelines.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy hereof has been furnished by courier, to MELYNDA MELEAR, Assistant Attorney General, 1655 Palm Beach Lakes Boulevard, Third Floor, West Palm Beach, Florida 33401, this 10th day of MARCH, 1995.

Margaret Good-Earnest
MARGARET GOOD-EARNEST
Assistant Public Defender

A P P E N D I X

years for each of the ten original offenses, to run consecutively to each other as well as to his two concurrent life terms.

It is with appellant's ten five-year sentences for the original ten offenses running consecutively with the two life terms that we find error. The permitted range on appellant's scoresheet with a one cell bump up for the violation of probation was 22 years to life. *See* Fla. R. Criminal P. 3.988(i) (form 9). However, the trial court granted the state's motion for aggravation of sentence and found that an upward departure from the guidelines was warranted. Insofar as the ten five-year sentences were to run consecutively not only to each other, but also to the two concurrent life sentences imposed for the new offenses, the ten five-year sentences constituted an upward departure. We find that all of the departure reasons listed in the trial court's sentencing order (except for the statement that the departure was necessary for the protection of the public) related to the acts constituting and surrounding the new crimes and therefore, were invalid reasons for departure. *See Lambert v. State*, 545 So. 2d 838 (Fla. 1989) (factors relating to a violation of probation can not be used as grounds for departing from the sentencing guidelines).

While the state is correct that an escalating pattern of criminal activity is ordinarily a valid reason for departure, it is undisputed that here, only the new crimes, which constituted the violation of probation, were "escalations" in criminal activity. All of Osborne's original offenses were non violent property crimes. Once again, conduct which establishes violation of probation cannot be used to support an upwards departure from the sentencing guidelines. *See Lambert*.

Lastly, the final reason given for departure—protection of the public—we find invalid because the trial court cited no reasons for this conclusion other than the facts of the criminal conduct then before it. *See Lerma v. State*, 497 So. 2d 736, 738 (Fla. 1986) ("[f]actors already considered in the guidelines scoresheet, and inherent components of the crime can never support a departure sentence.").

Accordingly, we reverse and remand for correction of sentence to reflect that the ten five-year sentences imposed for offenses on which appellant's probation was revoked shall not run consecutively to the two concurrent life sentences imposed for armed robbery and attempted murder. We have examined the other issues raised by appellant and find no error.

REVERSED AND REMANDED. (HERSEY, J., concurs. STONE, J., concurs specially with opinion.)

(STONE, J., concurring specially.) In my judgment, the time to have resolved this was on Appellant's direct appeal four years ago, and not by collateral attack under rule 3.800(a). Could I do so, I would affirm. However, as this court has previously determined that this type of error can be addressed by post-conviction relief, I must concur. *Lindsay v. State*, 569 So. 2d 892 (Fla. 4th DCA 1990); *Braddy v. State*, 520 So. 2d 660 (Fla. 4th DCA), *rev. denied*, 528 So. 2d 1183 (Fla. 1988).

I note that the state does not dispute that the sentence imposed is a departure from the guidelines.

* * *

Criminal law—Sentencing—Community control revocation—No error to sentence defendant to both incarceration and community control without written reason for departure in sentencing for community control revocation—Higher cell of guidelines which was permitted on revocation of community control did not involve mutually exclusive disjunctive sentencing alternatives

GEORGE SINKS, Appellant, v. STATE OF FLORIDA, Appellee. 4th District. Case No. 93-3388. L.T. Case No. 92-1112. Opinion filed November 2, 1994. Appeal from the Circuit Court for Indian River County; Paul B. Kanarek, Judge. Counsel: Richard L. Jorandby, Public Defender, and Debra Moses Stephens, Assistant Public Defender, West Palm Beach, for appellant. Robert A. Butterworth, Attorney General, Tallahassee, and Sarah B. Mayer, Assistant Attorney General, West Palm Beach, for appellee.

ON MOTION FOR REHEARING

(PER CURIAM.) Having affirmed the trial court's revocation of community control and the sentence it imposed thereafter, notwithstanding both parties' contentions that we may have overlooked their supplemental briefs in which they agree we are bound by *State v. Davis*, 630 So. 2d 1059 (Fla. 1994), and *State v. VanKooten*, 522 So. 2d 830 (Fla. 1988), we deny appellant's motion for rehearing.

Appellant was originally convicted of a lewd and lascivious act upon a child and sentenced to two years community control followed by ten years probation.

The trial court concluded, and we agreed by our Per Curiam Affirmed, that appellant was in willful violation of his community control. In doing so, the trial court noted that it believed appellant was a danger to other young boys in the community, and explained to appellant that the original sentence imposed was designed to provide "the most amount of supervision to make sure that this wouldn't happen again. But as soon as you got out of jail, you decided you didn't, at least until you decided you got your life in order, weren't going to be under any supervision and that's exactly what I wanted to try and stop from happening by my [original community control] sentence."

Appellant's community control and probation were revoked and appellant was sentenced to four years imprisonment to be followed by two years community control and eight years probation. The parties contend that appellant was improperly sentenced to both incarceration *and* community control. We disagree.

"[W]hen the presumptive guideline sentence directs community control *or* incarceration, the imposition of both represents a departure from the sentencing guidelines, requiring proper written reasons for the departure." *VanKooten*, 522 So. 2d at 830-31; *accord Davis*, 630 So. 2d at 1059-60. We read these cases, however, to apply only where the guidelines sentencing range presents mutually exclusive disjunctive sentencing alternatives. *See also Gilyard v. State*, 636 So. 2d 134 (Fla. 2d DCA 1994).

In the instant case, appellant's sentence was imposed after revocation of his community control, which permitted the trial judge to sentence appellant within the next higher cell without a written reason for departure. Florida Rule of Criminal Procedure 3.701(d)(14) provides:

> (14) Sentences imposed after revocation of probation or community control must be in accordance with the guidelines. The sentence imposed after revocation of probation or community control may be included within the original cell (guidelines range) or may be increased to the next higher cell (guidelines range) without requiring a reason for departure.

In this case, the next higher cell provides for a recommended sentencing range of three and one-half to four and one-half years incarceration and a permitted sentencing range of two and one-half to five and one-half years incarceration. This next highest cell does not involve "disjunctive sentences." Accordingly, the trial court did not err in sentencing appellant to both incarceration and community control without a written reason for departure. (GLICKSTEIN and GUNTHER, JJ., concur. STONE, J., dissents with opinion.)

(STONE, J., dissenting.) Acknowledging some uncertainty as to the limits of the *VanKooten* reasoning as applied in *State v. Davis*, 630 So. 2d 1059 (Fla. 1994), I nevertheless conclude that *Davis* applies to this sentence. I would therefore grant rehearing, reverse the sentence, and remand for resentencing with leave to consider whether there are grounds for departure.

* * *

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Appendix has been furnished by courier, to MELYNDA MELEAR, Assistant Attorney General, 1655 Palm Beach Lakes Blvd., Third Floor, West Palm Beach, Florida 33401, this 10th day of MARCH, 1995.

Margaret Good-Earnest

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