IN THE SUPREME COURT OF FLORIDA

GEORGE SINKS,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

CASE NO. 84,832
(4TH DCA 93-3388)

PETITIONER'S BRIEF ON JURISDICTION

RICHARD L. JORANDBY
Public Defender
15th Judicial Circuit

MARGARET GOOD-EARNEST
Assistant Public Defender
Chief, Appellate Division
Attorney for George Sinks
Criminal Justice Building
421 Third Street, 6th Floor
West Palm Beach, Florida 33401
(407) 355-7600
Florida Bar No. 192356

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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

On a violation of community control where the permitted sentencing range was two-and-a-half years to five-and-a-half years incarceration, the trial court sentenced petitioner to four years imprisonment to be followed by two years of community control and eight years probation. On appeal, Mr. Sinks contended that this sentence violated this Court's directives in State v. Davis, 630 So. 2d 1059 (Fla. 1994) and State v. VanKooten, 522 So. 2d 830 (Fla. 1988), that imposition of community control and incarceration was a sentencing guideline departure requiring proper written reasons. Although the state agreed with petitioner's position, the district court disagreed relying on the Second District's decision in Gilyard v. State, 636 So. 2d 134 (Fla. 2d DCA 1994), pending review on a certified question #83,619. The Fourth District read VanKooten and Davis to apply only where the sentencing guideline range presented community control and probation as mutually exclusive disjunctive sentencing alternatives. Sinks v. State, 19 Fla. L. Weekly D2313 (Fla. 4th DCA Nov. 2, 1994) (A-1). The Fourth District then affirmed Mr. Sinks' sentence while Judge Stone dissented, acknowledging that Davis applies to the sentence which should be reversed and remanded for resentencing (A-1).

Notice of discretionary review was timely filed. This brief on jurisdiction follows.

SUMMARY OF ARGUMENT

The decision in petitioner's case allowing the trial judge to impose a sentence of community control and incarceration expressly and directly conflicts with this Court's decision in State v. Davis, 630 So. 2d 1059 (Fla. 1994) and Knepfer v. State, 19 Fla. L. Weekly D954 (Fla. 5th DCA April 29, 1994), which hold that a sentence of incarceration in Department of Corrections and community control is a departure sentence from the guidelines. Another basis for this Court's jurisdiction exists. The District Court cited as controlling authority a case which is pending discretionary review in this Court, Gilyard v. State, 636 So. 2d 134 (Fla. 2d DCA 1994), Supreme Court case number 83,619. Citation to controlling authority which is pending Supreme Court review also confers jurisdiction on this Court to review the decision in petitioner's case.

ARGUMENT

THE COURT HAS JURISDICTION TO REVIEW THE DECISION IN PETITIONER'S CASE FOR TWO REASONS: IT DIRECTLY AND EXPRESSLY CONFLICTS WITH STATE V. DAVIS AND KNEPFER V. STATE

AND

THE COURT CITED AS CONTROLLING AUTHORITY A DECISION THAT IS NOW PENDING REVIEW IN THIS COURT.

The decision of the Fourth District Court of Appeal in petitioner's case expressly and directly conflicts with the decision of this Court in State v. Davis, 630 So. 2d 1059 (Fla. 1994) and the decision of another district court, Knepfer v. State, 19 Fla. L. Weekly D954 (Fla. 5th DCA April 29, 1994), which hold that a sentence of incarceration to the Department of Corrections and community control is a departure from the guidelines for which written reasons must be provided. In Knepfer, the court held that even if the total sentence does not exceed the maximum period of incarceration which could have been imposed, the imposition of both DOC prison time and community control is a departure on the authority of State v. Davis. In petitioner's case the district court expressly disagreed with that holding of Davis, even though one judge in dissent found that Davis applied and that the sentence was illegal and should be reversed. Rather, the Fourth District relied on the Second District's decision in Gilyard v. State, 636 So. 2d 134 (Fla. 2d DCA 1994), to affirm petitioner's sentence.

However, Gilyard v. State cited as controlling authority is pending review in this Court under case number 83,619 on a certified question regarding Davis applicability. This Court has

jurisdiction to review a decision where the district court's decision expressly relies upon authority which is pending review in the Supreme Court of Florida. Jollie v. State, 405 So. 2d 418 (Fla. 1981). State v. Brown, 475 So. 2d 1 (Fla. 1985).

For these reasons, this Court should accept jurisdiction, correct the illegal sentence imposed upon petitioner and decide for edification of the district courts, whether a sentence of community control and state incarceration is a guideline departure sentence for there is a troubling disunity of opinion on this issue throughout the reported cases in Florida.

CONCLUSION

Wherefore, based on the argument and authorities cited, petitioner respectfully requests this Court grant review of his case.

Respectfully Submitted,

RICHARD L. JORANDBY
Public Defender
15th Judicial Circuit

Margaret Good-Earnest
MARGARET GOOD-EARNEST
Assistant Public Defender
Criminal Justice Building
421 Third Street, 6th Floor
West Palm Beach, Florida 33401
(407) 355-7600
Florida Bar No. 192356

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy hereof has been furnished by courier, to SARAH B. MAYER, Assistant Attorney General, 1655 Palm Beach Lakes Boulevard, Third Floor, West Palm Beach, Florida 33401, this 12th day of DECEMBER, 1994.

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 SARAH B. MAYER, Assistant Attorney General, 1655 Palm Beach Lakes Blvd., Third Floor, West Palm Beach, Florida 33401, this 12th day of DECEMBER, 1994.

Margaret Good-Earnest

MARGARET GOOD-EARNEST
Assistant Public Defender