IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO. 84,832

GEORGE SINKS,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

RESPONDENT'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner was the Defendant and Respondent was the prosecution in the Criminal Division of the Circuit Court of the Seventeenth Judicial Circuit, in and for Indian River County, Florida. Petitioner was the Appellant and Respondent was the Appellee in the Fourth District Court of Appeal. In this brief, the parties shall be referred to as they appear before this Honorable Court of Appeal except that Appellee may also be referred to as the State.

In this brief, the symbol "R" will be used to denote the record on appeal in the district court and the symbol "T" will be used to denote the transcript of the trial court proceedings.

All emphasis in this brief is supplied by Respondent unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

Respondent cannot accept Petitioner's statement of the case and facts; although it is accurate, it is incomplete and contains no citations to the record on appeal.

Petitioner was charged with one count of lewd and lascivious act on a child by information filed November 9, 1992 (R 8). On January 11, 1993, Petitioner requested to change his plea to no contest based on the prosecutor's agreement to recommend a second grid guidelines sentence (R 24-27). On February 8, 1993, Petitioner was adjudicated guilty (R 28-29), and sentenced to two (2) years community control followed by ten (10) years probation (R 30-37).

In August 1993, an affidavit of violation of community control was filed alleging that Petitioner violated the terms of community control by changing his address without first obtaining the consent of his community control officer, and by leaving the supervision of the department of corrections (R 41). An evidentiary hearing was conducted on the allegations contained in the affidavit on October 26, 1993 (T 2-34). The trial court found Petitioner had willfully violated the conditions of his community control by failing to reside at his designated residence and by moving without obtaining the consent of his community control officer (T 35), and revoked Petitioner's community control and probation (R 47-48). Petitioner's guidelines scoresheet indicated a total of 193 points which, when using the one cell bump-up allowed for a violation of probation,

resulted in a recommended range of 3 1/2 to 4 1/2 years incarceration and a permitted range of 2 1/2 to 5 1/2 years incarceration (R 46). Petitioner was sentenced to four (4) years incarceration, followed by two (2) years community control, followed by eight (8) years probation (T 40-41, R 49-57, 61-64).

SUMMARY OF THE ARGUMENT

The trial court correctly imposed, and the district court properly approved, Petitioner's sentence which included a term of incarceration followed by a term of community control. As the guidelines simply provided for a range of years in which Petitioner could be sentenced, and as the presumptive sentence did not contain any disjunctive language, no VanKooten or Davis issue was involved in this case. To the extent the aggregate of Petitioner's incarceration and community control exceed the guidelines permitted range by 6 months, this cause must be remanded so that the trial court can correct Petitioner's sentence or enter written reasons for departing from the guidelines.

ARGUMENT

THE SENTENCING RULE IN STATE V. DAVIS, DOES NOT APPLY IN THIS CASE WHERE THE SENTENCING RANGES SPECIFIED BY THE GUIDELINES WERE NOT PHRASED IN THE DISJUNCTIVE, BUT MERELY PROVIDED FOR A TERM OF YEARS (Restated).

Petitioner argues that his sentence must be reversed because the aggregate of the incarcerative and community control portions of his sentence exceeds the guidelines permitted range maximum, and because his sentence which combines incarceration, community control and probation, violates the rule enunciated in State v. Davis, 630 So. 2d 1059 (Fla. 1994). Respondent disagrees.

Petitioner argues in his brief that as the State conceded the State v. Davis issue below, it may not take a different position in this Court (Petitioner's brief at page 6), yet ironically that is precisely what Petitioner has done! In this Court, Petitioner's primary (and most persuasive) argument is that the total of the term of incarceration and term of community control portions of his sentence exceeds the upper limit of the permitted range for his guidelines score by six months; however, this argument was never raised in the district court or in the trial court. As it appears the non-probationary portions of Petitioner's sentence are in excess of the guidelines, this cause should be remanded to the trial court to allow the trial court to correct the sentence or to set forth valid reasons for departure. State v. Betancourt, 552 So. 2d 1121 (Fla. 1989).

Petitioner's second argument is that his sentence, which imposes both incarceration and community control, is a departure

for which no written reasons have been provided and which violates the rule in State v. Davis. The State submits that the rule enunciated in VanKooten v. State, 522 So. 2d 830 (Fla. 1988), and amplified in State v. Davis, supra, and Felty v. State, 630 So. 2d 1092 (Fla. 1994), is not applicable to the circumstances of the instant case. In each of these cases the guidelines provided for sentences of 'community control **or** a period of incarceration'. This Court found that the use of the word "or" was intended to make the sentencing alternatives mutually exclusive, thus sentencing a defendant to both incarceration **and** community control was error.

In the instant case, the guidelines (with a one cell bump-up for Petitioner's violation of probation) provide for a recommended range of 3 1/2 to 4 1/2 years incarceration and a permitted range of 2 1/2 to 5 1/2 years incarceration. Thus here, unlike the circumstances in VanKooten, Davis, and Felty, the permissible sentencing range **did not** contain mutually exclusive disjunctive sentencing alternatives. Here, as in Gilyard v. State, 636 So. 2d 134 (Fla. 2nd DCA 1994), pending review on a certified question, Case Number 83,619, the sentencing guidelines simply provided for a range of years within which the defendant could be incarcerated. Clearly, when the guidelines provide for incarceration of a defendant, he may be sentenced to **both** incarceration and community control so long as the total period does not exceed the guidelines permitted range. See: Betancourt v. State, 550 So. 2d 1121, 1122 (Fla. 3rd DCA

1989); Dyer v. State, 534 So. 2d 843, 844 (Fla. 5th DCA 1988). As recognized by the Fourth District below, the sentencing alternatives applicable to Petitioner did not contain any disjunctive language, therefore no VanKooten/Davis/Felty issue was involved and the trial court's decision to sentence Petitioner to both incarceration and community control did not, in and of itself, constitute a departure. Thus that aspect of the Fourth District's decision must be affirmed.

To the extent the aggregate of Petitioner's incarcerative and community control terms exceeds the maximum range allowed by the guidelines, the State acknowledges that this case must be remanded to the trial court for clarification and/or correction. However, as the record reveals the trial judge did not know he was imposing a departure sentence, and particularly in light of the trial court's express concerns that Petitioner was a danger to other young boys in the community and the judge's desire to provide Petitioner with the most amount of supervision he could (T 40-42), the State submits that upon remand, the trial court should be allowed to depart from the guidelines in sentencing Petitioner if the court deems it appropriate and sets forth valid reasons for departure. State v. Betancourt, 552 So. 2d 1107 (Fla. 1989).

CONCLUSION

Wherefore, based on the foregoing arguments and the authorities cited therein, Appellee respectfully requests this Court AFFIRM the reasoning of the Fourth District below, but REMAND for resentencing or entry of an order setting forth reasons for departing from the guidelines.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing "Answer Brief of Respondent" has been furnished by Courier to: MARGARET GOOD-EARNEST, Assistant Public Defender, Criminal Justice Building/6th Floor, 421 Third Street, West Palm Beach, FL 33401, this 3rd day of ~~March~~ April, 1995.

Of Counsel