ORIGINAL

IN THE SUPREME COURT OF FLORIDA

FILED
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Chief Deputy Clerk

STATE OF FLORIDA,

Petitioner,

vs.

DAVID DUGAN,

Respondent.

Case No. 87,109

RESPONDENT'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Respondent David Dugan was the defendant and petitioner was the prosecution in the Criminal Division of the Circuit Court of the Seventeenth Judicial Circuit, In and For Broward County, Florida.

In the brief, the parties will be referred to as they appear before this Honorable Court. Undersigned counsel represents David Dugan only.

The following symbols will be used:

R = Record on Appeal

IB = Initial brief of Petitioner, the State of Florida

STATEMENT OF THE CASE AND FACTS

Respondent accepts Petitioner's statement of the case and facts.

SUMMARY OF ARGUMENT

The trial court did not abuse its discretion in dismissing charges against respondent after he successfully completed a drug treatment program pursuant to Florida Statutes 397.12 and 397.17 (1991). These sections grant trial courts broad discretion in fashioning remedies, including dismissal, to deal with substance abusers charged with criminal offenses. The state's attempt to narrow the statute and relegate it to a mere sentencing statute is not consistent with the legislature's intent as clearly stated in the statute, nor is it consistent with the plain language of the statute which authorizes courts to refer for treatment those "charged with" as well as those "convicted of" a crime. The fact that the state disagrees with what the legislature has done was not reviewable by the Fourth District and is not reviewable by this Court; the state's remedy lies in convincing the legislature to change its clearly worded statute. The district court therefore correctly upheld the trial court's action and must be affirmed.

ARGUMENT

THE TRIAL COURT DID NOT ERR IN DISMISSING THE INFORMATION BECAUSE CHAPTER 397 OF THE FLORIDA STATUTES (1991) AUTHORIZES THAT RESULT.

Respondent was charged in April 1993, with a single instance of possession of cocaine. As authorized by sections 397.011(2) and 397.12, Fla. Stat. (1991), the statute in effect at the time, the trial court referred respondent for drug treatment. In October 1994, after respondent successfully completed the drug treatment and demonstrated his ability to remain drug and arrest free, the trial court, in reliance on section 397.17 entered an order dismissing the case against respondent (R 375). The state challenges the trial court's authority to enter the dismissal.

Throughout its brief petitioner refers to provisions in chapter 397 of the Florida Statutes as that chapter was amended effective October 1, 1993. ch. 93-39, § 8 Laws of Fla. 1993. Likewise the district court's opinion uses the language and numbering of the current statute rather than the statute in effect at the time of the crime. However, as petitioner concedes in its footnote, IB at 6, the statutes which control are those in effect on the date of the alleged crime. Art. X, sec. 9, Fla. Const.; Heath v. State, 532 So. 2d 9 (Fla. 1st DCA 1988), rev. denied, 541 So. 2d 1173 (Fla. 1989). Because those are the controlling provisions, respondent will refer to the statutory provisions and numbers as they existed in April 1993. On that date chapter 397 contained the following provisions:

> § 397.011(2): *It is the intent of the Legislature* to provide an alternative to criminal imprisonment for individuals capable of rehabilitation as useful citizens.... For a violation of any provision of chapter 893...relating to possession of any substance regulated thereby, *the trial judge may, in his discretion*, require the defendant to participate in a drug treatment program licensed by the Department of Health and Rehabilitative Services pursuant to the provisions of this chapter.... Such required participation may be imposed *in*

> *addition to or in lieu of any penalty or probation otherwise prescribed by law....*
>
> § 397.10: *It is the intent of the Legislature* to provide a meaningful alternative to criminal imprisonment for individuals capable of rehabilitation as useful citizens....It is *the further intent of the Legislature to encourage trial judges to use their discretion to refer persons charged with, or convicted of,* violation of laws relating to drug abuse or violation of any law committed under the influence of a narcotic drug or medicine to a state-licensed drug rehabilitation program *in lieu of, or in addition to, imposition of criminal penalties.*
>
> § 397.12: When any person...*has been charged with or convicted of* a violation of any provision of chapter 893...the court...*may in its discretion* require the person *charged or convicted* to participate in a drug treatment program licensed by the department under the provisions of this chapter. If referred by the court, *the referral may be in lieu of or in addition to final adjudication, imposition of any penalty or sentence, or any other similar action.* If the accused desires final adjudication, his constitutional right to trial shall not be denied....
>
> § 397.17: When any person successfully completes a drug treatment program to which he was referred under the provisions of ss. 397.10-397.20, *such completion may be satisfaction in full of all penalties for violation of the law regarding which he was charged or convicted.*

Fla. Stat. (1991) (emphasis added). Compare § 397.705, Fla. Stat. (1993), which petitioner concedes does not substantively change the previous provisions. See also § 893.15, Fla. Stat. (1993).

The state asserts the "primary guide to statutory interpretation is to determine and give effect to the purpose and intent of the Legislature...." IB at 7. Respondent does not disagree. However, the first rule of statutory construction is to give a statute its plain meaning; if the meaning is clear, then there is nothing to construe. Blount v. State, 581 So. 2d 604 (Fla. 2d DCA 1991), Perkins v. State, 576 So. 2d 1310 (Fla. 1991), see also Lamont v. State, 610 So. 2d 435 (Fla. 1992) (even if the legislature may have meant something else, the court is not authorized to depart from the plain meaning of the statute.)

One does not have to look hard to discover the legislative intent in enacting chapter 397 because the legislature twice plainly stated its goal in sections 397.011(2) and 397.10, quoted above. Because these statutes are in fact so plain, they need no construction. The only possible question then is how the stated intent can be achieved. Again, reading the statute as a whole, the legislature's intent is plain. While it is certainly true that the word "dismiss" does not appear, the legislature's broad grant of discretion to trial judges to accomplish the legislature's goal should leave little doubt that dismissal is and was intended to be authorized: Section 397.011(2) specifically directs that it is the intent of the legislature to allow trial judges the discretion to order drug treatment *in lieu of any penalty*. That such discretion is not limited to after the fact determinations of guilt, however, is demonstrated by the legislature's repeatedly use of the expressions "charged with or convicted of" and "in lieu of or in addition to." See §§ 397.011(2), 397.10, 397.12, & 397.17, Fla. Stat. (1991). Certainly the legislature knows the difference between merely being charged with an offense and being convicted. Likewise the expression "in lieu of" needs no explanation. As the district court found, these words can only mean what they say: a judge, in his/her discretion, can refer a person charged with certain offenses to drug treatment and successful completion is payment in full "for violation of the law regarding which he was charged or convicted." See § 397.17, Fla. Stat. (1991). State v. Dugan, 20 Fla. L. Weekly D2334 (Fla. 4th DCA 1995).

Claiming reliance on rules of statutory construction, the state asserts, as it did in the district court, the chapter 397 provisions are nothing more than sentencing statutes. To arrive at that conclusion, the state focuses on three words, adjudication, penalty, and sentence, from the phrase "final adjudication, imposition of penalty or sentence, or other action" in section 397.705, Fla. Stat. (1993), the revised version of the statute. (Similar language appears in § 397.12 of the applicable statute.) According to the state, those

three words are strictly sentencing references and thus "other action" is just another synonym. Again, however, in attempting to interpret what really needs no interpretation, petitioner has focused on individual words while ignoring the whole. For instance, the very next sentence in section 397.12 demonstrates the reference to "final adjudication" in this statute refers to a resolution of the validity of the criminal allegations and is *not* a sentencing reference at all. That next sentence provides: "If the accused desires *final adjudication*, his constitutional right to trial shall not be denied." Obviously if "final adjudication" referred to a defendant already having been found guilty and merely pending sentence, then the right to trial would have already come and gone. The state's argument that these are strictly sentencing alternatives also completely ignores the specific language of the statute which repeatedly authorizes referral to treatment for those merely *charged* with an offense. Thus, when considered as part of the whole, "other action" in fact means action other than adjudication, penalty, or sentence.

The fact that the legislature readopted the controlling language from earlier sections when it revised chapter 397, and particularly section 397.705, the statute to which the state has repeatedly referred in its brief, is further evidence that it always intended what it had previously written. See Brooks v. State, 478 So. 2d 1052 (Fla. 1985) (court may look to subsequent legislation to determine legislative intent of previous statute). The new statute, which in part consolidated former sections 397.12 through 397.22, provides in part:

> If any offender...*is charged with or convicted of a crime*, the court or criminal justice authority with jurisdiction over that offender may require that offender to receive services from a service provider licensed under this chapter. If referred to by the court, *the referral may be instead of or in addition to final adjudication, imposition of any penalty or sentence, or other action.*

§ 397.705(1), Fla. Stat. (1993). Again, the legislature employed the term "in lieu," included persons "charged with," and again made the broad reference to "or other

action." Plainly speaking, the referral may be instead of other action in criminal court. Petitioner's narrower interpretation wholly ignores the legislative authorization of "other action." Certainly one "other action" available to persons "charged with" offenses is to have that charge dismissed.

Further, as the district court's opinion accurately recognized, if the state were correct in its claim that chapter 397 needs to be interpreted, a claim with which respondent does not agree, then the statute is necessarily ambiguous. State v. Dugan, 20 Fla. L. Weekly at D2335. One of the few statutorily imposed rules for construction is contained in section 775.021(1), Florida Statutes (1993). The very first rule is:

> The provisions of this code and offenses defined by other statutes shall be strictly construed; when the language is susceptible of differing construction, it shall be construed most favorably to the accused.

Thus, the legislature has mandated a rule of lenity to apply to criminal statutes. Even under the state's worst case scenario, the only possible ambiguity concerns resolution of charges still pending against a person who has successfully completely a court referred treatment program. While the statute does not mandate dismissal, there is no reason to conclude the legislature did not intend to authorize dismissal as a viable option and incentive to succeed at treatment, to be exercised in the trial court's discretion.

The state's references to and reliance on newly enacted section 948.08(6)(a), Fla. Stat. (1993),[1] does not demonstrate any intent on the part of the legislature to limit the remedies available under chapter 397. The legislature's addition of section 948.08(6) greatly broadened the availability of pretrial intervention, supervised by the Department

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[1] This section, ch. 93-229, § 1, became law May 15, 1993, after the legislature had already amended chapter 397, in 93-39 § 8 which was signed into law April 17, 1993. West's Florida Session Law Service 1993. Both statutes' effective dates were October 1, 1993. Perhaps the legislature decided it made no sense to allow court referral and dismissal under ch. 397 but not under 948.08.

of Corrections, which had previously been limited to those persons referred to and approved by the prosecutor. Compare State v. Board, 565 So. 2d 880 (Fla. 5th DCA 1990). No longer does the state have that sole authority over who is referred nor the sole power to dismiss informations against those who complete the pretrial intervention program; instead, now the court itself can refer certain qualified individuals and dismiss their charges upon successful completion. § 948.08(6)(c)(2), Fla. Stat. (1993). But the legislature's grant of *additional* authority to trial judges to refer into programs run by the Department of Corrections can hardly be read as a limitation on a court's discretion and authority to also consider and refer into chapter 397 programs run by the Department of Health and Rehabilitative Services. See § 397.10, Fla. Stat. (1991). Clearly these are separate programs with separate requirements.

The state argues that the legislature's use of the word "dismissal" in section 948.04(6) demonstrates that dismissal is not within the wide range of "other action" authorized by chapter 397. IB at 12. That argument fails for two reasons. First, the statute which controls this case long predates the 1993 amendment to section 948.08. See Kleparek v. State, 634 So. 2d 1148 (Fla. 4th DCA 1994) (where state seeking to enhance punishment, one would be hard pressed to say what earlier legislature not identical to current one might have intended.) Second, the comparison between section 948.08 and section 397.705, does not require the state's conclusion. Not only did the broadly written chapter 397 amendment precede the more narrow section 948.08 amendment, the latter section *requires* the trial court to dismiss upon successful completion, whereas chapter 397 leaves the trial court the discretion to fashion the appropriate remedy on a case-by-case basis. Thus under chapter 397 one individual's case might be dismissed upon successful completion of treatment but another person's might be required to proceed to the merits of the criminal charge and upon conviction receive further probation, a reduced jail sentence, etc. See Scates v. State, 603 So. 2d

504 (Fla. 1992) (referral to treatment program in lieu of otherwise mandatory minimum sentence authorized by legislature in § 397.12, Fla. Stat.). Further, while eligibility for treatment under section 948.08 has some restrictions, eligibility for treatment under 397 has few. The section 948.08 restrictions make sense both in terms of keeping first offenders with less severe drug problems and perhaps the greatest chance for success away from more long-time substance abusers who may need more time and different treatment to succeed. It appears the legislature wished to assure the first offenders a clean record while providing a greater range of discretionary options to the judge for all others.

Finally, the state argues the dismissal "represents an unjustified judicial interference with the state attorney's function and discretion in the prosecution of cases."[2] IB at 12. But that function was not divinely handed down. Rather, it is the legislature's right, not the prosecutor's, both to define what is a crime and what its penalties will be. Gore v. United States, 357 U.S. 386, 78 S. Ct. 1280, 2 L. Ed. 2d 1405 (1958).[3] Here the legislature determined that it would make possession of drugs illegal but offered an escape from the stigma of a criminal offense: if a person caught in web of drug use will

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[2] The state's insinuation that the trial court's dismissal "presupposes that the State will not agree to nolle prosse," IB at 14, is spurious at best and certainly misleading. Is the state suggesting that it really intended to nolle prosse one of these cases, but since the judge dismissed them first, the state spent the time, money, and energy of the court and appellate counsel on both sides to appeal a case it intended to dismiss anyway? Mr. Dugan's case and Mr. Burrough's cases originated in 1993. Some of the companion cases which are traveling with this case in the district court had been dragging through the circuit court since 1991. Many involved first time offenders who had been drug free for 2-3 years when their cases were finally dismissed by the trial judge. When is it the state intends or intended to file one of these mythical nolle prosses? The trial court did what it did because the state categorically refused to even consider a nolle prosse as an option for *any* defendant's successful completion of treatment.

[3] "Whatever view may be entertained regarding severity of punishment, whether one believes in its efficacy or its futility, (reference deleted,) *passim*, these are peculiarly question for legislative policy." 78 S. Ct. at 1285.

accept and successfully complete treatment, then not only would no sentence be imposed, but treatment could be substituted for criminal prosecution. § 397.17, Fla. Stat.; compare Scates v. State, supra; State, v. Williams, 603 So. 2d 635 (Fla. 4th DCA 1992). The legislature was well within its right to devise and enact such a statute. The state's claim should thus be addressed in the legislature, not the court.

The trial judge exercised the discretion which the legislature granted to him. Absent a showing of a clear abuse of that discretion, the trial court's order must be affirmed because, as the district court found, the state has failed to show any error in this case.

CONCLUSION

Based on the foregoing arguments and the authorities cited therein, respondent respectfully requests this Court affirm the decision of the district and trial courts.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished by courier to Sarah Mayer, Assistant Attorney General, 1655 Palm Beach Lakes Boulevard, Suite 300, West Palm Beach, Florida 33401-2299 this 27 day of February, 1996.

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