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FLORIDA SUPREME COURT

STATE OF FLORIDA,

Petitioner,

vs.

Case No. 87,551
5th DCA No. 95-1176

BENNIE TROUTMAN,

Respondent.
_____/

PETITIONER'S INITIAL BRIEF ON THE MERITS

ROBERT A. BUTTER WORTH
ATTORNEY GENERAL

ALLISON LEIGH MORRIS
ASSISTANT ATTORNEY GENERAL
Fla. Bar #931660
444 Seabreeze Blvd.
Fifth Floor
Daytona Beach, FL 32118
(904) 238-4990

COUNSEL FOR PETITIONER

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STATEMENT OF THE CASE AND FACTS

On August, 4, 1994, the Respondent was charged by information of Count I, unlawful possession of a controlled substance (third degree felony); Count II, unlawful possession of a controlled substance (first degree misdemeanor); and Count III, use or possession of drug paraphernalia (first degree misdemeanor).[1] (R. 29). On November 16, 1994, he pled no contest to all three counts, and was adjudicated guilty by the trial court. (R. 1-8). On April 11, 1995, the trial court sentenced him to 364 days county prison for each count, with the sentences to be served consecutively. (R. 9-19).

On appeal, the Fifth District Court of Appeal reserved this sentence but certified the following question to this Court:

> CAN ARMSTRONG BE APPLIED TO A CASE
> IN WHICH A DEFENDANT IS CONVICTED
> OF A FELONY AND A MISDEMEANOR?

Troutman v State, 668 So. 2d 340 (Fla. 5th DCA 1996).

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[1]References to the record on appeal shall be referred to as (R.). The State of Florida shall be referred to as the State or Petitioner. Bennie Troutman shall be referred to as Troutman or Respondent.

SUMMARY OF THE ARGUMENT

Under this Court's current interpretation of section 922.051, Florida Statutes, a defendant can receive multiple county jail sentences for misdemeanors. However, if the defendant his convicted of a felony with multiple misdemeanors, the trial court can sentence him to county jail for 364 days or less for all of the sentences combined. This Court should reinterpret section 922.051 so that there is no statutory prohibition to consecutive of less than one year in a county jail for any combination of crimes as a nonstate prison sanction.

ARGUMENT

POINT I

THERE IS NO STATUTORY PROHIBITION TO IMPOSING CONSECUTIVE SENTENCES OF LESS THAN ONE YEAR IN A COUNTY JAIL FOR ANY COMBINATION OF CRIMES AS A NONSTATE PRISON SANCTION.

The issue centers around the interpretation of section 922.051, Florida Statutes which provides:

> When a statute expressly directs that imprisonment be in a state prison, the court may impose a sentence of imprisonment in the county jail if the total of the prisoner's cumulative sentences is not more than one year.

Originally, this Court interpreted this statute as permitting a trial judge to sentence a defendant convicted of a felony to county jail, as long as all sentences imposed cumulatively equaled 364 days or less. Dade County v Baker, 265 So. 2d 700 (Fla. 1972). In Singleton v State, 554 So. 2d 1162 (Fla. 1990), this Court receded from this holding, and ruled that if a defendant is serving one sentence of 364 days or less in county jail, he may be sentenced to another term of 364 days or less, as long as both sentences are not imposed at the same sentencing hearing. Finally, in Armstrong v State, 656 So. 2d 455 (Fla.

interpretation means this statute applies to a felony even if the sentence imposed is less than one year. However, this is not the most logical interpretation of the statute in light of intervening legislative enactments in Chapter 921.

Section 922.051 was enacted before the guidelines came into effect. With the advent of the score sheet, persons convicted of felonies as the primary offense are regularly sentenced to county jail or other nonstate prison sanctions. If the current interpretation of section 922.051 is applied to the guidelines, a defendant convicted of a felony will never spend more than 364 days total in county prison, regardless of the number of other convictions. There is no legal or logical reason for this result.

The guidelines statute and section 922.051 conflict with each other to the extent that it is clear that the legislature could not have intended the foregoing result. Fortunately, rules of statutory construction can be employed to resolve such conflicts. The one presently applicable state,"When two statutes conflict, the later promulgated statute should prevail as the last expression of legislative intent." McKendry v State, 641 So. 2d 45 (Fla. 1994). Therefore, section 922.051 must be interpreted as it is modified by Chapter 921.

A score sheet recommendation that amounts to any nonstate prison sentence removes the convictions from the scope of section 922.051. When the guidelines statute expressly mandates that the sentence for a felony not be served in a state prison, then section 922.051 is inapplicable. There is no other statutory impediment to imposing consecutive sentences for any combination of misdemeanors or felonies and requiring the prisoner to be incarcerated in a county jail.

In Dade County v Baker, 265 So. 2d 700 (Fla. 1972), this court adopted the Judge Carroll's dissenting opinion from Dade County v Baker, 258 So. 2d 511 (Fla. 1972). Judge Carroll reasoned that the statute was concerned with sentences for felonies, "since the offenses it deals with are those for which imprisonment in the state prison is directed by statute." Kline v State, 509 So. 2d 1178 (Fla. 5th DCA 1987), approved by this Court in Singleton v State, 554 So. 2d 1162 (Fla. 1990), elaborated on this analysis. The Court looked to the statutory definitions of "felony" and "misdemeanor" in determining 922.051 applies only to felonies.[2] In effect, the court determined that

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[2]Sections 775.082, Florida Statutes (1993) provides:

> (1) The term "felony" shall mean any criminal offense that is punishable under the laws of this

the phrase "any statute which expressly directs that imprisonment be in state prison" was applicable to any crime punishable by a term in the state penitentiary which exceeds one year. However, the Kline and Singleton courts interpreted section 922.051 too broadly when they equated the first phrase with all felonies as defined in section 775.082.

While a felony is defined as a crime which is punishable by more than one year in jail, there is no statute that expressly directs this punishment. With the exception of capital felony (which is punishable by death or a mandatory term of life in

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> state, or that could be punishable if committed in this state, by death or imprisonment in a state penitentiary. "State penitentiary" shall include state correctional facilities. A person shall be imprisoned in the state penitentiary for each sentence which, except an extended term, exceeds 1 year.
>
> (2) The term "misdemeanor" shall mean any criminal offense that is punishable under the laws of this state, or that would be punishable if committed in this state, by a term of imprisonment in a county correctional facility, except an extended term, not in excess of 1 year.

state prison), all other felonies "may" be punished by a term not to exceed a certain number of years. While a felony is defined as a crime punishable up to one year in jail, this term of incarceration is not statutorily mandated for all felonies. The use of the word "imprisonment" is not dispositive because it is also used to define misdemeanors. There is no set time or provision mandating a state prison sentence for felonies. Certainly, trial courts regularly sentence defendants convicted of third degree felonies to county jail. Both section 922.051 and section 775.082 can be harmonized by limiting a sentence served in county jail on a felony to 364 days.

These statutory provisions can also be interpreted in concert with the guidelines statute. Under the current statutory scheme, the length of a prison or jail sentence is not expressly set forth by statute, but is determined pursuant to the sentencing guidelines set forth in Section 921.0014, Florida Statutes (1993) and Florida Rule of Criminal Procedure 3.702:

> If the total sentence points are less than or equal to 40, the recommended sentence, absent a departure, shall not be state prison. However, the sentencing court may increase sentence points less than or equal to 40 by up to and including 15 percent to arrive at total sentence points in excess

> of 40. If the total sentence points are greater than 40 but less than or equal to 52, the decision to sentence the defendant to state prison or a nonstate prison sanction is left to the discretion of the sentencing court. If the total sentence points are greater than 52, the sentence, absent a departure, must be to state prison.

Thus, a defendant who has committed several felonies, but scores less than 40 points must be committed to county prison on any one crime. Even if he has additional multiple felonies or misdemeanors, he will serve a maximum of 364 days. Similarly, if the defendant scores over 52 points, he will receive a state prison sanction. If he falls within the 40 to 52 point range, the trial court has the option of sentencing him to state prison or county jail.

Section 922.021 should be applicable only the guidelines statute expressly directs that imprisonment be in a state prison. If the guidelines mandate incarceration in county jail, then the defendant has received a nonstate prison sanction, regardless of the fact that he was convicted of a felony. If the guidelines direct a county prison term or other nonstate prison sanction, section 922.051, by its own language, is not applicable. If the trial court is given the option between state prison and nonstate

prison, the statute is applicable only when the trial court chooses to sentence the defendant to a term greater than one year. Thus, section 922.051 is inapplicable whenever the guidelines mandate a nonstate prison sanction, or if the trial court, given a choice between nonstate and state incarceration, opts for county jail.

Section 922.051 also affects the interpretation of section 921.188, Florida Statutes. The latter statute provides that 1) assuming no law to the contrary, 2) a felony offense and 3) a presumptive guideline sentence of 366 days to twenty two months in state prison based on a scoresheet score of 40 to 52 points, a court may place a defendant in a local detention facility as a condition of probation or community control for the duration of the presumptive sentence. The statute provides a mechanism whereby the Department of Corrections can contract with county facilities for prison space; however, it does not limit a court's ability to place a defendant in a local detention facility for less than a year. The statute is applicable when a trial court wishes to place a defendant in county prison for a term exceeding 365 days but less than twenty two months. Under section 922.051, section 921.188 can never be given effect because a trial court can never sentence a defendant convicted of a felony to a county

facility for more than 364 days. The statutes should be read together so that if a defendant scores between 40 and 52 points, a trial court can sentence the defendant to 364 days per felony or misdemeanor without an agreement between DOC and the county facility. If a trial court sentences a defendant to 366 days or more in a county facility, then an agreement pursuant to section 921.188 is required. This statute provides further support for the state's contention that the legislature did not intend to unduly limit felony sentences in county jail.

Another example of statutes which "expressly direct imprisonment be in state prison" are the myriad of mandatory minimum penalties. See e.g. section 775.087, Fla. Stat. (1993)(Three years for firearm); Section 893.135 (trafficking). These statutes take precedence over guidelines of lesser punishment. Snead v State, 616 So. 2d 964 (Fla. 1993).

This interpretation means that section 922.051 only activates when a defendant is sentenced to state prison by virtue of a specific statute or the guidelines. A trial court is then permitted to stack felonies with a nonstate prison sentences in the same manner that misdemeanors are stacked. This eliminates the anomaly where a person convicted of five misdemeanors may be sentenced to five years in county jail, but a defendant with one

felony and four misdemeanors is limited to 364 days in county jail.

The rules of construction set forth by the Florida legislature in section 775.021(4)(b), Florida Statutes (1993) support the foregoing interpretation. The sections states,"The intent of the Legislature is to convict and sentence for each criminal offense committed in the course of one criminal episode or transaction and not to allow the principle of lenity as set forth in subsection (1) to determine the legislative intent." The current application of Fla. Stat. 922.051 on a defendant who is convicted of even one felony and numerous other misdemeanors limits his sentence to 364 days. He receives one county jail term for all of his separate convictions. The legislature clearly intends to punish each separate crime and conviction. Permitting a county jail term for each crime, rather than limiting the total possible sentence to one year in county jail, accomplishes this intended result.

Even if this Court determines that section 922.051 refers to all felonies as defines by section 775.082, it should extend Armstrong to situations such as this case where there is one felony and several misdemeanors. As long as the felony is the primary offense and incarceration is for 364 days or less on that

crime, then any additional county jail time pursuant to a misdemeanor sentence is not in violation of the statute.

In Armstrong, the defendant was sentenced to consecutive one-year county jail terms after pleading no contest to two first-degree misdemeanors. 656 So. 2d at 456. This Court observed that there is no statutory authority for incarcerating misdemeanors in state prison. It correctly held that,"(B)y its plain language, section 922.051 does not apply to misdemeanors." Under this language, a defendant convicted of a misdemeanor may not receive state penitentiary time for that crime, and the statute does not even affect the sentence. This holding should be applied to all misdemeanors, regardless if they are coupled with another misdemeanor, as in Armstrong, or a felony, as in the present case.

If this Court finds that the first phrase of section 922.051 ("When a statute expressly directs that imprisonment be in a state prison") refers to felonies, then it logically follows that the second half of the statute also refers to felonies. Thus, "cumulative sentences" refers only to cumulative felony sentences. In light of this court's finding that it does not apply to misdemeanors at all, this is the most logical interpretation.

Section 922.051 can still be given effect despite its apparent conflict with other statutes if its first phrase is interpreted to mean any felony with a mandatory state prison sentence or a guideline sentence of greater than 364 days rather than any felony punishable by greater than one year in state prison. At the very least, a court should be permitted to stack one felony sentence with several misdemeanor sentence because Armstrong holds that section 922.051 does not apply to misdemeanors. The punishment imposed should have some semblance of proportionality with the severity of crime. Permitting misdemeanors, but not felonies, to be stacked rewards the defendant who commits a more serious crime. A trial court should be permitted to stack felonies and misdemeanors as long as the recommended sentence for each conviction is a nonstate prison sanction.

CONCLUSION

Based on the arguments and the authorities presented herein, the Petitioner respectfully prays this honorable court answer the certified question in the negative.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

ALLISON LEIGH MORRIS
ASSISTANT ATTORNEY GENERAL
Fla. Bar #931660
444 Seabreeze Blvd.
Fifth Floor
Daytona Beach, FL 32118
(904)238-4990

COUNSEL FOR PETITIONER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Initial Brief of Petitioner has been hand delivered to the Public Defender's box at the Fifth District Court of Appeals on this 15th day of April, 1995.

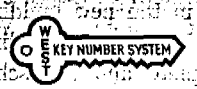
Allison Leigh Morris
Of Counsel

APPENDIX A

and immediate danger to the public welfare. *Cf. Global Water Conditioning v. Department of Agriculture and Consumer Services Div. of Forestry*, 521 So.2d 126 (Fla. 1st DCA 1987). The school board submits that it is only making a limited purchase and authorizing the installation of the first system in a multi-phase contract. However, in the absence of a serious and immediate danger, the school board's rules do not provide a procedure to obtain limited or partial relief from its stay provision. We therefore grant the petition, as plenary appeal from the final school board action would not provide an adequate remedy. Until the protest is resolved by final school board action, the stay mandated by the school board rules must be reimposed. *Cf. Cianbro Corp. v. Jacksonville Transportation Authority*, 473 So.2d 209 (Fla. 1st DCA 1985).

PETITION GRANTED; STAY REIMPOSED.

DAUKSCH and ANTOON, JJ., concur.



Bennie TROUTMAN, Appellant,

v.

STATE of Florida, Appellee.

No. 95–1176.

District Court of Appeal of Florida, Fifth District.

Feb. 23, 1996.

Defendant pled nolo contendere in the Circuit Court, Volusia County, William C. Johnson, Jr., J., to felony count of unlawful possession of a controlled substance and misdemeanor counts of unlawful possession of a controlled substance and unlawful possession and use of drug paraphernalia. Defendant appealed. The District Court of Appeal, Thompson, J., held that consecutive sentences in county jail aggregating over one year were improper where one conviction was for a felony.

Sentences vacated and remanded; question certified.

Criminal Law ⇐1210(4)

Consecutive sentences for two counts of unlawful possession of a controlled substance and one count of unlawful possession and use of drug paraphernalia were improper, where aggregate of sentences exceeded one year in county jail and one possession conviction was for a felony.

Appeal from the Circuit Court for Volusia County, William C. Johnson, Jr., Judge.

James B. Gibson, Public Defender and Kenneth Witts, Assistant Public Defender, Daytona Beach, for Appellant.

Robert A. Butterworth, Attorney General, Tallahassee, and Belle B. Turner, Assistant Attorney General, Daytona Beach, for Appellee.

THOMPSON, Judge.

Bennie Troutman (herein "Troutman") appeals the imposition of consecutive sentences in the county jail, the aggregate of which exceeds one year. The state concedes that these sentences were improper. We vacate the sentences and remand for resentencing.

Troutman entered a plea of nolo contendere and was adjudicated guilty of one felony (Count I) and two misdemeanors (Counts II and III). Count I was unlawful possession of a controlled substance,[1] Count II was unlawful possession of a controlled substance,[2] and Count III was unlawful possession and use of drug paraphernalia.[3] Troutman was sentenced to 364 days on each count, to be served consecutively. The Florida Supreme Court has approved the decision of this court

1. § 893.13(6)(a), Fla.Stat. (1993).

2. § 893.13(6)(b), Fla.Stat. (1993).

3. § 893.147(1), Fla.Stat. (1993).

which held proper consecutive sentences, the aggregate of which exceed one year in the county jail, where all the crimes for which the sentences are imposed are misdemeanors. *See Armstrong v. State*, 640 So.2d 1250 (Fla. 5th DCA 1994), *approved Armstrong v. State*, 656 So.2d 455 (Fla.1995). This court, however, has expressly disapproved sentences in the county jail where the aggregate exceeds one year, if any of the convictions is a felony. *Locke v. State*, 656 So.2d 571 (Fla. 5th DCA 1995); *see also Singleton v. State*, 554 So.2d 1162 (Fla.1990), *approving Kline v. State*, 509 So.2d 1178 (Fla. 1st DCA 1987). In the instant case, because one of the convictions was a felony, the trial court must resentence Troutman.

We certify the following question to the supreme court as one of great public importance:

CAN *ARMSTRONG* BE APPLIED TO A CASE IN WHICH A DEFENDANT IS CONVICTED OF A FELONY AND MISDEMEANOR?

Sentences VACATED; REMANDED for resentencing in accordance with *Locke v. State*, 656 So.2d 571 (Fla. 5th DCA 1995).

DAUKSCH and COBB, JJ., concur.

KEY NUMBER SYSTEM

Michael E. PHILBRICK, Appellant,

v.

COUNTY OF VOLUSIA, Appellee.

No. 95-2006.

District Court of Appeal of Florida, Fifth District.

Feb. 23, 1996.

Former employee of county sheriff's department sought review of decision of county manager which upheld his termination. The Circuit Court, Volusia County, John W. Watson, III, J., denied employee's petition for writ of certiorari. Certiorari was granted. The District Court of Appeal, Thompson, J., held that circuit court afforded former employee procedural due process and applied correct law in upholding decision of county administrator.

Writ denied.

Constitutional Law ⇐278.4(5)

Officers and Public Employees ⇐72.33(2)

Circuit court afforded terminated employee of county sheriff's office procedural due process and applied correct law in determining that county administrator was not bound by decision of personnel board, that employee be suspended for 90 days without pay but not terminated, and that county administrator had option to exercise his discretion to modify board's decision by terminating employee. U.S.C.A. Const.Amend. 14.

Appeal from the from the Circuit Court for Volusia County; John W. Watson, III, Judge.

Lawrence J. Nixon, Daytona Beach, for Appellant.

Nancye Jones, Assistant County Attorney, Deland, for Appellee.

THOMPSON, Judge.

Michael E. Philbrick ("Philbrick") appeals an order of the circuit court sitting in its review capacity pursuant to Florida Rule of Appellate Procedure 9.030(c)(3). The circuit court denied his petition for writ of certiorari. Philbrick sought review of a decision by the Volusia County Manager which upheld his termination by the sheriff of Volusia County. Philbrick filed a notice of appeal in the circuit court within 30 days of the decision, and he filed an initial brief in this court. Instead, Philbrick should have filed a writ of certiorari with this court. Nevertheless, this court has jurisdiction, and, pursuant to Florida Rule of Appellate Procedure 9.040(c), we treat the notice of appeal as a petition for writ of certiorari. *Johnson v. Citizens State Bank*, 537 So.2d 96 (Fla.1989). Having de-