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FILED
SID J. WHITE
APR 29 1996
CLERK, SUPREME COURT
By _____
Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

ANTRONE LAMONT SIMMONS,

Respondent.

CASE NO. 87,~~617~~ 618

CERTIFIED QUESTION FROM THE DISTRICT COURT OF APPEAL
FIRST DISTRICT

PETITIONER'S INITIAL BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner, the State of Florida, the Appellee in the First District Court of Appeal and the prosecuting authority in the trial court, will be referenced in this brief as Petitioner, the prosecution, or the State. Respondent, Antrone Lamont Simmons, the Appellant in the First District Court of Appeal and the defendant in the trial court, will be referenced in this brief as Respondent, defendant, or by his proper name.

A two volume record on appeal was prepared for the violation of probation in trial court case no. 93-1845, and will be referred to as "VOP R" followed by the appropriate page number. A one volume record on appeal in trial court case number 94-5123 and will be referred to by the symbol "R". These trial cases were consolidated for purposes of appeal as District Court case no. 95-2321/2322. "IB" will designate the Initial Brief of Petitioner. Each symbol will be followed by the appropriate page number in parentheses.

All emphasis through bold lettering is supplied unless the contrary is indicated.

STATEMENT OF THE CASE AND FACTS

By information filed April 29, 1993 under lower court case no. 93-1845, the defendant was charged with possession of cocaine and three misdemeanors. (VOP R 1-2) Defendant entered no contest pleas, and was placed on two years probation for the felony. (VOP R 6-11) The sentencing guidelines scoresheet called for any nonstate prison sanction. (VOP R 5) On December 16, 1994, an affidavit of violation of probation was filed, alleging that appellant had possessed marijuana. (VOP R 12)

By information filed November 18, 1994, under lower court case no. 94-5123, the defendant was charged with possession of more than 20 grams of cannabis and possession of paraphernalia. (R 1) A 1994 sentencing guidelines scoresheet called for any nonstate prison sanction. (R 8-10)

The defendant appeared and entered a plea in both cases on April 17, 1995. (VOP R 16-17) His probation was revoked. (VOP R 48)

On May 23, 1995, defendant appeared for sentencing on both cases. On the new possession of marijuana charge, defendant was placed on community control for two years, with the condition that he spend six months in jail; and on the new misdemeanor paraphernalia charge, he was placed on a concurrent one year

probation. (VOP R 33-34; VOP R 45-47; R 45-46) On the violation of probation case, he was placed on community control for two years, with the condition that he spend 90 days in jail to run consecutively to the six month period previously imposed (VOP R 34; VOP R 45-47) The defendant appealed the sentences and the district court reversed holding that the sentences of community control with a special condition of incarceration was a disjunctive sentence and was improper. The court certified the following question:

> IS THE RULE IN STATE V. DAVIS, 630 So.2d 1059 (Fla. 1994), REQUIRING WRITTEN REASONS FOR DEPARTURE WHEN COMBINING NONSTATE PRISON SANCTIONS, APPLICABLE UNDER THE 1994 SENTENCING GUIDELINES?

The petitioner timely invoked the jurisdiction of this Court to review the certified question.

SUMMARY OF ARGUMENT

ISSUE I.

The certified question should be answered no and the trial court sentence approved because a sentence of two years community control (with the condition that the defendant serve six months in the county jail) is statutorily authorized by the revised 1994 sentencing guidelines. This sentence is within the statutory guidelines because it is a nonstate sanction.

ISSUE II

The state recognizes the case law relied upon by the district court but urges this Court to reexamine and clarify these decisions in order to bring them into conformity with clear statutory language and legislative intent.

ISSUE I

IS THE RULE IN STATE V. DAVIS, 630 So. 2d 1059 (FLA. 1994), REQUIRING WRITTEN REASONS FOR DEPARTURE WHEN COMBINING NONSTATE PRISON SANCTIONS APPLICABLE UNDER THE 1994 SENTENCING GUIDELINES? [CERTIFIED QUESTION]

The issue presented in the lower tribunal was whether the trial court erred under the revised 1994 statutory guidelines when it imposed a six month period of incarceration in the county jail as a condition of community control. The district court determined that this sentence was a guidelines departure under prior cases of this Court interpreting the pre-1994 statute and certified the above question.

In evaluating this question the district court erroneously relied on State v. Van Kooten, 522 So. 2d 830 (Fla. 1988), and State v. Davis, 630 So. 2d 1059 (Fla. 1994) because these decisions applied the previous statute and are not applicable to the 1994 statute. In both Davis and Van Kooten, the defendants' scoresheets were calculated under the pre-1994 sentencing guidelines. The resultant scores placed each defendant in a grid cell which directed a presumptive guidelines sentence of incarceration **or** community control. Because these penalties were

disjunctive, this Court held that the imposition of both incarceration and community control constituted a departure sentence requiring written reasons justifying the departure.

Since these cases were decided, this Court has limited the scope of Van Kooten and (by implication) Davis to cases involving presumptive guidelines sentences phrased in the disjunctive. Gilyard v. State, 653 So.2d 1024 (Fla. 1995). Gilyard clarified the nature of these decisions by emphasizing that they were grounded on statutory interpretation of the legislature's use of the disjunctive. Thus, when a statute authorizing penalties is not in the disjunctive, community control and county jail time is not a departure sentence.

The question presented requires this Court to interpret the revised sentencing guidelines enacted by the legislature which apply, as here, to offenses committed on or after January 1, 1994. § 921.001(4)(b)2, Fla. Stat. (1994 Supp.) Gone from the new guidelines are the old grid cells and disjunctive penalties. Fla. R. Crim. P. 3.702(16) now states in pertinent part:

> If the total sentence points are less than or equal to 40, the recommended sentence, absent a departure, shall not be state prison.

This tracks the applicable statutory provision, § 921.0014(2):

> If the total sentence points are less than or equal to 40, the recommended sentence shall not be a state prison sentence;

Thus, a trial court is not required to choose between mutually exclusive penalties, but is free to exercise its discretion and impose any authorized nonstate prison sanction without having to provide written departure reasons.

Here, petitioner's crime was committed in 1994 (R 1) and was a third-degree felony punishable by imprisonment of up to five years. §§ 893.13(6)(a) and 775.082(3)(d). Because his guidelines score was less than 40 (R 8-10, 37), the statutory guidelines sentence was any penalty other than a state prison sentence. Rule 3.702(d)(16). Moreover, under section 948.01(3), Florida Statutes (1993), the trial court had the discretion to place the petitioner "in a community control program upon such terms as the court may require." Furthermore, under section 948.03(5), Florida Statutes (1993), the trial court was also authorized to impose incarceration of up to 364 days in the county jail. County jail is, of course, a nonstate sentence. Thus, the sentence imposed in the instant case of two years' community control with the condition that the Appellant serve six months of that two year period in the county jail (R 38, 43)) was statutorily authorized and consistent with the revised 1994

sentencing guidelines which in pertinent part are not in the disjunctive.

This Court should answer the certified question in the negative and quash the decision of the district court

ISSUE II

WHETHER THE DISTRICT COURT PROPERLY DETERMINED THAT A SENTENCE OF COMMUNITY CONTROL WITH A SPECIAL CONDITION OF INCARCERATION WAS A DEPARTURE SENTENCE.

The district court also held that it was required to find that the combination of community control and jail time imposed for the defendant's violation of probation under the pre-1994 guidelines was a departure sentence. The grounds for the district court's reasoning were its' readings of the opinions in State v. Van Kooten, 522 So. 2d 830 (Fla. 1988); Pope v. State, 561 So. 2d 554 (Fla. 1990); Davis v. State, 617 So. 2d 11239 (Fla. 1st DCA 1993), which was approved in State v. Davis, 630 So. 2d 1059 (Fla. 1994); and Felty v. State, 630 So. 2d 1092 (Fla. 1994), which reaffirmed Van Kooten.

The State recognizes that these cases may be read as supporting the district court decision. However, because the seminal case of Van Kooten was decided without the benefit of this Court's subsequent decision in Smith v. State, 537 So. 2d 982 (Fla. 1989), and because the holding in State v. Davis (by disapproving Tillman v. State, 555 So. 2d 940 (Fla. 5th DCA 1990)) inadvertently modified substantive statutory law by nullifying a trial court's sentencing discretion under section

948.03(5), Florida Statutes (1993), the state respectfully urges this Court to reexamine and clarify State v. Davis, 630 SO. 2d 1059 (Fla. 1994)

This Court held in Van Kooten that when a guidelines sentence disjunctively directs alternative penalties of either incarceration or community control, the trial court is limited to imposing one or the other. In Gilyard, this Court clarified Van Kooten as grounded on statutory interpretation and held that the combination of community control and incarceration was a permissible sentence within the guidelines when the statute was not disjunctive. Gilyard simply recognizes that when the legislature only authorizes a single sentence that only a single sentence may be imposed

In Tillman, the Fifth District Court of Appeal was called upon to decide whether the trial court erred by requiring Tillman to serve 180 days in the county jail as a condition of community control when Tillman's scoresheet specified "incarceration 'or' community control." Tillman, 55 So. 2d at 941. Relying, inter alia, on Van Kooten, Tillman argued that the trial court violated Fla. R. Crim. P. 3.701(d)(11) by imposing a departure sentence without providing written reasons justifying the departure. Rejecting this argument, the court said Tillman's reliance on Van

Kooten was misplaced because it did "not address the discretion of the sentencing judge to impose jail time as a condition of community control. See § 948.03(7), Fla. Stat. (1987),[1] and Reese v. State, 535 So. 2d 676 (Fla. 5th DCA 1988)." Id. (emphasis in original). In Reese, the court had said:

> Section 948.03(7), Florida Statutes (1987) specifically recognizes the power of the trial court to impose a period of incarceration in the county jail not to exceed 364 days as a condition of community control, and we find nothing in the guidelines to the contrary.

Reese v. State, 535 So. 2d 676, 677 (Fla. 5th DCA 1988)

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[1] The pertinent language in subsection (7) of this statute is now located in subsection (5) which reads as follows:

> () The enumeration of specific kinds of terms and conditions shall not prevent this court from adding thereto such other or others as it considers proper. The court may rescind or modify at any time the terms and conditions theretofore imposed by it upon the probationer or offender in community control. However, if the court withholds adjudication or guilt or imposes a period of incarceration as a condition of probation or community control, the period shall not exceed 364 days, and incarceration shall be restricted to either a county facility, a probation and restitution center under the jurisdiction of the Department of Corrections, a probation program drug punishment phase I secure residential treatment institution, or a community residential facility owned or operated by any entity providing such services.

§ 948.03(5), Florida Statutes (1993) (emphasis added).

In State v. Davis, this Court was asked whether combining county jail incarceration with community control constituted a departure sentence. Not only did this Court answer the certified question in the affirmative, it went outside the facts of Davis and specifically disapproved Tillman. State v. Davis, 630 So. 2d at 1060. In its' rationale, this Court relied on the commission notes as authority for concluding that a presumptive guidelines sentence directing community control or incarceration was disjunctive and therefore imposing both constituted a departure sentence. Id. However, the commission notes were not adopted by this Court as part of the rules nor have they been subsequently enacted by the Legislature as substantive law. See In Re Rules of Crim. Proc. (Sentencing Guidelines), 439 So. 2d 848, 849 (Fla. 1983); Ch. 84-328, § 1 Laws of Florida. Further, and this was not noted in Davis, these notes conflict with the provisions of section 948.03(5). By relying on the commission notes, Davis inadvertently nullifies substantive statutory law enacted by the Florida Legislature, thus violating the Separation of Powers Doctrine under which only the Legislature may change substantive law. Smith, 537 So. 2d at 985. See also Florida Rules of Criminal Procedure Re: Sentencing Guidelines (Rules 3.701 and 3.988), 576 So. 2d 1307, 1308 (Fla. 1991)(concluding doctrine of separation

of powers requires legislative approval of proposed changes to sentencing guidelines). For these reasons, the state urges this Court to revisit and clarify Davis thereby implementing section 948.03(5) and removing the violation of the Separation of Powers Doctrine, article II, section 3 of the Florida Constitution, which this Court has maintained "repeatedly and without exception," is absolutely required by Florida's constitution. B.H. v. State, 645 So. 2d 987, 991 (Fla. 1994).

Factually and pragmatically, the state points out that there is a significant difference in kind between imposing **separate** sentences of community control, incarceration, and probation and imposing a single sentence of community control or probation with a period of incarceration as a special condition. The essence of probation and community control as created by the legislature in Chapter 948 Fla. Stat. is to impose local punitive and rehabilitative measures without imposing the more serious sanction of state prison incarceration. The conditions of community control are part of the community control sentence itself, are not separate sentences, and are limited to the maximum period authorized for community control.

Because petitioner Simmons sentence of community control with a special condition of incarceration is authorized by the

legislature in § 948.03(5) Fla. Stat. (1993), his sentence does not violate the disjunctive sentencing provisions of the 1993 guidelines.

Therefore, this Court should clarify Davis, quash the decision of the district court below, thereby reinstating the legal sentence imposed by the trial court in the exercise of its discretion.

CONCLUSION

Based on the foregoing, the state respectfully submits the certified question should be answered in the negative, the decision of the First District Court of Appeal quashed, and the sentences entered in the trial court should be affirmed.

Respectfully submitted,

ROBERT A. BUTTERWORTH
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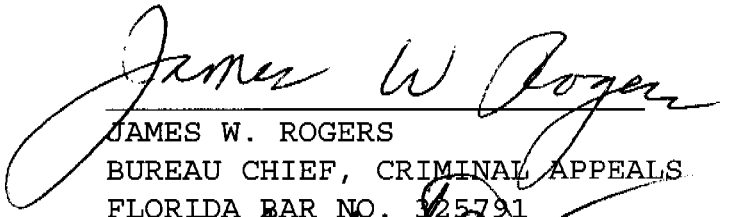

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing PETITIONER'S INITIAL BRIEF ON THE MERITS has been furnished by U.S. Mail to P. Douglas Brinkmeyer, Esq.; Assistant Public Defender; Leon County Courthouse, Suite 401, North; 301 South Monroe Street; Tallahassee, Florida 32301, this 29th day of April, 1996.

Edward C. Hill, Jr.
Assistant Attorney General

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