IN THE FLORIDA SUPREME COURT

STATE OF FLORIDA,

Petitioner,

v. CASE NO. 87,618

ANTRONE LAMONT SIMMONS,

Respondent.

ON DISCRETIONARY REVIEW
FROM THE FIRST DISTRICT COURT OF APPEAL

BRIEF OF RESPONDENT ON THE MERITS

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

P. DOUGLAS BRINKMEYER
ASSISTANT PUBLIC DEFENDER
CHIEF, APPELLATE INTAKE
DIVISION
LEON COUNTY COURTHOUSE
SUITE 401
301 SOUTH MONROE STREET
TALLAHASSEE, FLORIDA 32301
(904) 488-2458

ATTORNEY FOR RESPONDENT
FLA. BAR #197890

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IN THE SUPREME COURT OF FLORIDA

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	:	
Respondent.	:	
	:	

BRIEF OF RESPONDENT ON THE MERITS

I PRELIMINARY STATEMENT

Attached hereto as an appendix is the opinion of the lower tribunal, which has been reported as Simmons v. State, 668 So. 2d 654 (Fla. 1st DCA 1996).

II STATEMENT OF THE CASE AND FACTS

Respondent accepts petitioner's recitation at PB at 2-3. Respondent wishes to point out that the lower tribunal reversed both of respondent's sentences. The certified question and petitioner's arguments in Issue I only affect respondent's sentence in lower court case no. 94-5123 under the 1994 guidelines.

Petitioner's arguments in Issue II affect the reversal of respondent's sentence in lower court case no. 93-1845, on the violation of probation under the pre-1994 sentencing guidelines.

III SUMMARY OF THE ARGUMENT

Respondent will argue in this brief that petitioner's request for relief should be denied. Respondent's sentence of six months in jail and community control under the 1994 sentencing guidelines was illegal, because it exceeded the recommended sanction of nonstate prison, and no reasons for departure were given.

Likewise, respondent's sentence on the violation of probation case of 90 days county jail and community control under the 1993 guidelines is illegal because it exceeds the guidelines range of any nonstate prison sanction or community control, and no reasons for departure were given.

Petitioner, at this late date, seeks to have this Court overrule its line of cases which prohibit such sentences under the pre-1994 guidelines. This Court should not accept petitioner's invitation.

While the law is not quite as clear under the 1994 guidelines as it was under the pre-1994 guidelines, a reading of the new rule shows the intent of the framers to preclude both county jail and community control when the scoresheet calls for nonstate prison sanctions.

The four pillars, which supported this Court's decision under the former sentencing guidelines in State v. Davis, 630 So. 2d 1059 (Fla. 1994), carry over to the new rule.

This Court should answer the certified question in the affirmative and approve the decision of the lower tribunal on both the pre-1994 and present sentencing guidelines.

IV ARGUMENT

ISSUE I

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

Petitioner does not dispute that the law in effect prior to January 1, 1994, prohibited one in respondent's position from receiving community control and jail time when the scoresheet called for any nonstate prison sanction. In State v. VanKooten, 522 So. 2d 830 (Fla. 1988), this Court held that when the guidelines cell calls for community control or incarceration, either community control or incarceration may be imposed, but not both. Otherwise, the sentence constitutes a departure for which written reasons are absolutely required. Pope v. State, 561 So.2d 554 (Fla. 1990).

This Court reaffirmed the viability of VanKooten in State v. Davis, *supra*, and in Felty v. State, 630 So. 2d 1092 (Fla. 1994). Respondent submits the four pillars supporting State v. Davis carry over to the new rule.

State v. Davis was founded upon four pillars. First, this Court in State v. VanKooten, *supra*, had interpreted "or" to mean "or," where the guidelines called for community control or 12-30 months, and this Court in State v. Davis reaffirmed that view. *See also* Felty v. State, *supra*.

Second, under the one peculiar range in the former

guidelines rule, which called for community control or 12-30 months, when a defendant fell into that recommended range, he could either receive 12-30 months incarceration or community control, but not both.

There is no similar "community control or 12-30 months" provision in the new rule. But according to the new guidelines rule, a point total of less than 40 calls for a nonstate prison sanction. Fla. R. Crim. P. 3.702(d)(16) provides:

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

Thus, nonstate prison sanctions still mean nonstate prison sanctions.

Third, State v. Davis was also founded upon the committee note to the old guidelines rule, Fla. R. Crim. P. 3.701(d)(8), which defined "nonstate prison sanction" as:

> any lawful term of probation with or without a period of incarceration as a condition of probation, a county jail term alone, or any nonincarcerative disposition.

There is no definition of "nonstate prison sanction" in the new guidelines rule, so we may use the former definition in construing the new rule.

Fourth, State v. Davis was also founded upon the committee note to the old guidelines rule, Fla. R. Crim. P. 3.701(d)(13), which cautioned that:

> Community control is not an alternative sanction from the recommended range of any nonstate prison sanction ... .

After examining the committee notes, this Court in State v. Davis concluded:

> Thus, nonstate prison sanctions, which include county jail time, community control, and incarceration are disjunctive sentences. Combining any or all of them creates a departure sentence for which written reasons must be given.

630 So. 2d at 1060.

There is no similar committee note regarding the definition of "community control" in the new rule, so we may use the former definition in construing the new rule.

The new rule provides that caselaw which existed at the time the new guidelines were adopted is superseded by the new rule if that caselaw is in conflict with the new rule. Fla. R. Crim. P. 3.702(b). The converse should also be true. Since there is no definition of "nonstate prison sanction" or "community control" in the new rule, to be in conflict with State v. Davis, then the existing caselaw should carry over to the new rule.

Since the existing caselaw carries over to and is not in conflict with the new rule, all four of the pillars supporting the court's holding in State v. Davis are still valid. First, we must continue to assume that "or" means "or," because the new rule does not overrule State v. VanKooten.

Second, although there is no "community control or nonstate prison sanction" cell, Fla. R. Crim. P. 3.702(d)(16) calls for a nonstate prison sanction for one who has 40 points or less.

Third and fourth, there is no conflicting definition of "nonstate prison sanction" or "community control" in the new rule.

Thus, since the four pillars supporting State v. Davis carry over to the new rule, respondent should not have received community control in addition to his county jail sentence, since community control is still not a nonstate prison sanction.

ISSUE II

THE DISTRICT COURT PROPERLY DETERMINED THAT A SENTENCE OF COMMUNITY CONTROL WITH A SPECIAL CONDITION OF INCARCERATION WAS A DEPARTURE SENTENCE UNDER THE 1993 SENTENCING GUIDELINES.

Petitioner, at this late date, seeks to have this Court overrule its line of cases which prohibit such sentences under the pre-1994 guidelines. This Court should not accept petitioner's invitation.

As noted above, this Court as early as 1988 held in State v. VanKooten, *supra*, that when the guidelines cell calls for community control or incarceration, either community control or incarceration may be imposed, but not both. Otherwise, the sentence constitutes a departure for which written reasons are absolutely required. Pope v. State, *supra*.

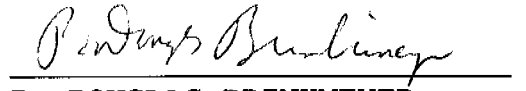
This Court reaffirmed the viability of VanKooten less than two years ago in State v. Davis, *supra*, and in Felty v. State, *supra*. Petitioner has not shown any compelling reason why these cases were decided incorrectly. Petitioner usually comes before this Court asking that the law of sentencing be applied with certainty and finality. Now petitioner asks this Court to throw well-settled law under the pre-1994 guidelines into confusion. This Court should decline to accept petitioner's invitation.

V CONCLUSION

Based upon the foregoing, this Court should answer the certified question in the affirmative and approve the decision of the lower tribunal on both the pre-1994 and present sentencing guidelines.

Respectfully Submitted,

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT



P. DOUGLAS BRINKMEYER
Fla. Bar No. 197890
Assistant Public Defender
Chief, Appellate Intake Division
Leon County Courthouse
Suite 401
301 South Monroe Street
Tallahassee, Florida 32301
(904) 488-2458

Attorney for Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to James W. Rogers and Edward C. Hill, Jr., Assistant Attorneys General, by delivery to The Capitol, Plaza Level, Tallahassee, Florida, this 6 day of May, 1996.

P. DOUGLAS BRINKMEYER

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,	:	
Petitioner,	:	
v.	:	CASE NO. 87,618
ANTRONE LAMONT SIMMONS,	:	
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	:	

APPENDIX TO BRIEF OF RESPONDENT ON THE MERITS

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

P. DOUGLAS BRINKMEYER
ASSISTANT PUBLIC DEFENDER
LEON COUNTY COURTHOUSE
SUITE 401
301 SOUTH MONROE STREET
TALLAHASSEE, FLORIDA 32301
(904) 488-2458

ATTORNEY FOR RESPONDENT

the meaning of section 440.19(1)(b), Florida Statutes (1985), and affirm.

Section 440.19(1)(b), Florida Statutes (1985), provides in part:

> All rights for remedial attention under this section shall be barred unless a claim therefor which meets the requirements of paragraph (d) is filed with the division within 2 years after the time of injury, except that, if payment of compensation has been made or remedial attention or rehabilitative services have been furnished by the employer without an award on account of such injury, a claim may be filed within 2 years after the date of the last payment of compensation or within 2 years after the date of the last remedial attention or rehabilitative services furnished by the employer....

Section 440.02(6), Florida Statutes (1985) defines "compensation" as "the money allowance payable to an employee or to his dependents as provided for in this chapter."

[2] This court has held that attorney's fees are not "compensation" within the meaning of section 440.20(8), Florida Statutes, which provides for a penalty for "compensation" not paid within 30 days after it becomes due. *See Department of Transp. v. Walker*, 634 So.2d 1158 (Fla. 1st DCA 1994); *Amodei v. GCC Beverages*, 449 So.2d 991 (Fla. 1st DCA 1984). The claimant argues, however, that in *Spaulding v. Albertson's, Inc.*, 610 So.2d 721 (Fla. 1st DCA 1992), this court considered attorney's fees to be "compensation" within the meaning of section 440.20(9), which provides for the payment of interest if any installment of "compensation" is not paid when it becomes due.[1] We find the claimant's argument to be without merit. In *Spaulding*, the court held that interest on an award of appellate attorney's fees began to accrue on the date of the JCC's order awarding attorney's fees. *Spaulding*, 610 So.2d at 724. Interest accrues on an award of attorney's fees from the date of the award by the JCC, even though chapter 440 does not expressly provide for the allowance of interest on an award of attorney's fees. *Stone v. Jeffres*, 208 So.2d 827 (Fla.1968).

Because the payment of an attorney's fee to the claimant's attorney is not the "payment of compensation" under section 440.19(1)(b), Florida Statutes (1985), we hold that the JCC properly dismissed the claimant's petition for benefits based upon the running of the two-year statute of limitations. The order of the JCC is therefore AFFIRMED.

BARFIELD and ALLEN, JJ., concur.

1. The claimant concedes that the *Spaulding* opinion does not specify that interest on the award of attorney's fees was payable pursuant to section 440.20(9).

Antrone Lamont SIMMONS, Appellant,

v.

STATE of Florida, Appellee.

No. 95-2321/2322.

District Court of Appeal of Florida, First District.

Feb. 21, 1996.

Defendant pled no contest in the Circuit Court, Escambia County, Kenneth L. Williams, J., to violation of probation and possession of marijuana and was sentenced on both counts to nonstate sanctions of community control with a jail term. Defendant appealed. The District Court of Appeal, Wolf, J., held that: (1) trial court imposed departure sentence by imposing both community control and a jail term after revocation of probation on possession of cocaine charge; (2) trial court's departure from sentencing guidelines on revocation of probation count without written reasons required reversal and remand for resentencing; and (3) trial court was required to submit written reasons for combining nonstate sanctions for possession of marijuana which resulted in

two years of community control with a condition that he serve six months in county jail.

Reversed and remanded; question certified.

1. **Criminal Law** ⇐982.9(7)

Trial court imposed departure sentence by imposing both community control and a jail term after revocation of probation on possession of cocaine charge, where recommended range under pre–1994 sentencing guidelines was community control or 12 to 30 months' incarceration.

2. **Criminal Law** ⇐1181.5(8)

Trial court's departure from sentencing guidelines without written reasons required reversal and remand for resentencing.

3. **Criminal Law** ⇐982.9(7)

Trial court was required to submit written reasons, in imposing sentence following probation revocation, for combining nonstate sanctions for possession of marijuana which resulted in two years of community control with a condition that he serve six months in county jail, although defendant was sentenced under 1994 sentencing guidelines.

An appeal from the Circuit Court for Escambia County; Kenneth L. Williams, Judge.

Nancy A. Daniels, Public Defender; P. Douglas Brinkmeyer, Assistant Public Defender, Tallahassee, for appellant.

Robert A. Butterworth, Attorney General; William J. Bakstran, Assistant Attorney General, Tallahassee, for appellee.

WOLF, Judge.

Antrone Lamont Simmons appeals his sentences entered after pleading no contest to violation of probation and possession of marijuana. Because both sentences combine nonstate sanctions of community control with a jail term and, thus, constitute departure sentences, we must reverse and remand for resentencing.

[1, 2] Based on the arrest for possession of marijuana, the trial court revoked appellant's probation for a 1993 possession of cocaine charge and sentenced him to two years' community control under the terms and conditions of the original probation with the added condition to serve 90 days in county jail. Appellant's recommended range under the pre–1994 guidelines was community control or 12–30 months' incarceration. Because the trial court combined community control with a jail term and, therefore, imposed a departure sentence without giving written reasons, we are required to reverse and remand for resentencing. *Davis v. State*, 617 So.2d 1139 (Fla. 1st DCA 1993), *approved* 630 So.2d 1059 (Fla.1994).

[3] Appellant was also sentenced to two years of community control with a condition that he serve six months in county jail for the possession of marijuana conviction. Appellant argues that although he was sentenced under the 1994 guidelines, the trial court is still required to submit written reasons for combining nonstate sanctions. We agree.

In *Davis, supra*, the supreme court interpreted the recommended guideline sentence of any "nonstate sanction" according to its own committee notes adopted by *Florida Rules of Criminal Procedure Re: Sentencing Guidelines (Rules 3.701 & 3.988)*, 522 So.2d 374 (Fla.1988):

> (d)(8) The first guideline cell in each category (any nonstate prison sanction) allows the court the flexibility to impose any lawful term of probation with or without a period of incarceration as a condition of probation, a county jail term alone or any nonincarcerative disposition. Any sentence may include the requirement that a fine be paid. The sentences are found in forms 3.988(a)–(i).

Id. at 379.

The *Davis* court concluded that nonstate prison sanctions are mutually exclusive:

> Thus, nonstate prison sanctions, which include county jail time, community control, and incarceration are disjunctive sentences. Combining any or all of them creates a departure sentence for which written reasons must be given.

Davis, 630 So.2d at 1060.

According to the sentencing guidelines scoresheet, prepared pursuant to rule 3.990, appellant's sentencing points totaled 5.3. Because appellant's points are less than 40, the trial court could not sentence him to

state prison without written reasons for departure. 3.702(d)(16), Fla.R.Crim.P.[1]

The committee notes adopted by the supreme court in *Amendments to Florida Rules of Criminal Procedure re Sentencing Guidelines*, 628 So.2d 1084, (Fla.1993), describe the presumptive sentence where total sentence points are less than or equal to 40:

> (d)(16) The presumptive sentence is assumed to be appropriate for the composite score of the defendant. Where the total sentence points do not exceed 40, the court has the flexibility to impose any lawful term of probation with or without a period of incarceration as a condition of probation, a county jail term alone, or any nonincarcerative disposition. Any sentence may include a requirement that a fine be paid.

The supreme court interpreted similar language in the pre–1994 guidelines to be mutually exclusive options; therefore, we feel that we are required to interpret the 1994 guidelines in the same manner. Because the trial court combined community control with a jail term without written reasons for the departure, we must remand for resentencing.

We recognize, however, that the language in *Davis, supra*, involving, "any nonstate sanction" is not used in the 1994 guidelines. The 1994 guidelines provide that "if the total sentence points are less than or equal to 40, the recommended sentence shall not be prison ..." § 921.0014(1), Fla.Stat. (1993).[2] We, therefore, certify the following question:

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

JOANOS and BENTON, JJ., concur.

1. The language of 3.702(d)(16) states in part: "(16) 'Presumptive sentence' is determined by the total sentence points. If the total sentence points are less than or equal to 40, the recommended sentence, absent a departure, shall not be state prison."

Michael D. TERRELL, Appellant,

v.

STATE of Florida, Appellee.

No. 95–04850.

District Court of Appeal of Florida, Second District.

Feb. 21, 1996.

Defendant who received ten-year sentence following his unconditional plea to violation of community control filed motion to correct illegal sentence, contesting guideline score-sheet calculation and asserting that sentence was upward departure. The Circuit Court, Pinellas County, Raymond O. Gross, J., denied motion, and defendant appealed. The District Court of Appeal held that: (1) points could not be assessed for victim's injury unless they reflected actual physical injury, and (2) error in assessing victim injury points was not harmless, entitling defendant to resentencing.

Reversed and remanded.

1. Criminal Law ⇐1246

In sentencing defendant for sexual abuse, points could not be assessed for victim's injury unless they reflected actual physical injury, where points for injury would have been permissible only if imposed for physical injury at time of offense. West's F.S.A. § 921.001(8).

2. Criminal Law ⇐1177

If sentence correction brought about by guideline errors results in lower cell, reconsideration of sentence is required even if, after reduction, prisoner's sentence lies in

2. This language can now be found in 921.0014(2), Fla.Stat. (1995).