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FILED
SID J. WHITE
MAY 24 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. 87,618

PETITIONER'S REPLY BRIEF ON THE MERITS

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TABLE OF CONTENTS

TABLE OF CITATIONS

RULES

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 or his proper name.

The symbol "R" will refer to the record on appeal, and the symbol "T" will refer to the transcript of the trial court's proceedings; "AB" will designate the Answer Brief of Respondent. 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

Petitioner will rely on the statement of the case and facts contained in the initial brief.

SUMMARY OF ARGUMENT

ISSUE I.

The certified question should be answered in the negative because the new law has eliminated the statutory provision upon which the lower tribunal based its decision. Further, Florida Rule of Criminal Procedure 3.702(b) provides that the where conflict exists between the new rule or statute and old caselaw, the caselaw is superseded by the new rule and statute. The caselaw dealing with disjunctive clauses in the old statute conflicts with the new statute which does not contain the language that was the basis for those decisions and the certified question. Therefore, the certified question should be answered in the negative, the opinion of the lower tribunal quashed and the judgement and sentence reinstated.

ISSUE II

Petitioner asserts that this Court should address this issue because the separation of powers issues presented by petitioner's reliance on Smith have not been addressed in this Court's prior decisions. As this Court has repeatedly recognized, separation of powers is absolutely required by Florida's constitution. B.H. v. State, 645 So.2d 987, 991 (Fla. 1994) Thus, this Court should address whether its decisions relying on committee notes to its

rule may be used to override the legislature's determination that incarceration may be imposed as a condition of community control.

ARGUMENT

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?

Respondent asserts that the old rules apply to the new guidelines. He is wrong and this Court should reject his interpretation.

Respondent argues that State v. Davis was founded upon four pillars (1) an interpretation that "or" means "or", (2) the guideline recommended cell provided incarceration "or" community control, (3) a committee note to the old rule 3.701(d)(8) which defined nonstate prison sanction as probation with or without incarceration, a county jail term, or any non incarcerative disposition, (4) and a committee note to the old rule 3.701(d)(13) which provided that community control is not an alternative sanction from the recommended range of any non state prison sanction.

The first problem with respondent's argument is that this Court in Gilyard v. State, 653 So.2d 1024 (Fla. 1995), clarified the prior caselaw he relies on by holding that those decisions

were based on this Court's interpretation of the disjunctive statutory language chosen by the legislature. This Court in Gilyard recognized that after Smith v. State, 537 So.2d 982 (Fla. 1989)(in which this Court held that the Court lacked the Constitutional authority to create substantive sentencing law) that decisions limiting statutorily authorized sentences could not be based on committee notes not adopted as substantive law by the legislature. Thus, respondent's argument, that there exist four valid basis for this Court's decision in Davis, is erroneous as it ignores the limitations imposed by Gilyard and Smith.

The respondent's second problem is that his remaining two pillars, which once provided the foundation for State v. Davis no longer exist.

The provisions of the new statute and rule totally change the sentencing mechanism applicable to individuals who do not qualify for state prison. The old guidelines provided a tiered sentencing scheme with specific sentencing alternatives. These began with nonstate prison sanctions as the lowest tier followed by community control as a second tier, finishing up with state prison sanctions of varying lengths making up the top tier. The new guidelines are a two tiered system. The rules provide that a

score of a certain number of points will result in a prison sentence and under forty points results in a sentence that shall not be a state prison sentence. By stating the authorized penalty in this fashion, the statute and rule authorize a sentencing court to impose on an offender such as the respondent any sentence available by law which is not a prison sentence. Community Control is not a prison sentence. See Chapter 948 Fla. Stat. (1993) Thus, it is an authorized sentence when an individual does not score enough points for a prison sentence.

As part of the community control, the legislature has authorized that certain conditions may be imposed. One authorized condition of Community control is incarceration in the county jail. In § 948.03(5) Fla. Stat. (1993)(now § 948.03(6)) the legislature provided:

> (6) The enumeration of specific kinds of terms and conditions shall not prevent the 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 of 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) Fla. Stat. (1993)

Under this provision the legislature has authorized the combination of various non prison sanctions in a sentence of community control. Therefore, respondent was properly sentenced.

Respondent argues that the provisions of Fla. R. Crim. P. 3.702(b) support his proposition that the case law interpreting the old rule carries over to the new sentencing mechanism. Respondent's argument fails to recognize the full text of rule 3.702(b) which is:

> (b) **Purpose and Construction.** The purpose of the 1994 revised sentencing guidelines and the principles they embody are set out in subsection 921.001(4). Existing caselaw construing the application of sentencing guidelines that is in conflict with the provisions of this rule or the statement of purpose or the principles embodied by the 1994 sentencing guidelines set out in subsection 921.001(4) is superseded by the operation of this rule.

Thus, the rule provides that prior caselaw is superseded by changed provisions of the rule or changed provisions of the statute.

Respondent recognizes that the first two legs of the Davis decision no longer exist. The new guideline provisions do not

contain the "or" language and do not contain alternative and disjunctive sentencing alternatives. These changes alone are sufficient to eliminate the basis for Davis.

Additionally, the Court in Smith and Gilyard eliminated any remaining viability from the argument that a committee note could be the basis for invalidating a legislatively authorized sentencing alternative. Therefore, all of respondent's pillars supporting Davis have crumbled and his argument must fail.

Community Control is an authorized sentencing alternative and the legislature has provided that incarceration can be a condition of community control. Therefore, this Court should answer the certified question in the negative.

Respondent also argues that the new rule does not define community control. Respondent is partially correct. There exists a new sentencing disposition section enacted by the legislature. While this section created in 1995 does not control the disposition of respondent's sentence (his offense committed in 1994), it is instructive.

Section 921.187(a) Fla. Stat. (1995) sets out the possible sentencing alternatives when an offender **does not** receive a state prison sentence. The statute provides a list of seventeen potential sanction which in pertinent part includes:

1. Impose a split sentence whereby the offender is to be placed on probation upon completion of any specified period of such sentence, which period may include a term of years or less.

2. Make any other disposition that is authorized by law.

3. Place the offender on probation with or without an adjudication of guilt pursuant to Sec. 948.01.

4. Impose a fine and probation pursuant to Sec. 948.011 when the offense is punishable by both a fine and imprisonment and probation is authorized.

5. Place the offender into community control requiring intensive supervision and surveillance pursuant to chapter 948.

6. Impose, as a condition of probation or community control, a period of treatment which shall be restricted to a county facility, a Department of Corrections probation and restitution center, a probation program drug punishment treatment community, or a community residential or nonresidential facility, excluding a community correctional center as defined in Sec. 944.026, which is owned and operated by any qualified public or private entity providing such services. Before admission to such a facility, the court shall obtain an individual assessment and recommendations on the appropriate treatment needs, which shall be considered by the court in ordering such placements. Placement in such a facility, except for a county residential probation facility, may not exceed 364 days. Placement in a county residential probation facility may not exceed 3 years. Early termination of placement may be recommended to the court, when appropriate, by the center supervisor, the supervising probation officer, or the probation program manager.

7. Sentence the offender pursuant to Sec. 922.051 to imprisonment in a county jail when a statute directs imprisonment in a state prison, if the offender's

cumulative sentence, whether from the same circuit or from separate circuits, is not more than 364 days.

8. Sentence the offender who is to be punished by imprisonment in a county jail to a jail in another county if there is no jail within the county suitable for such prisoner pursuant to Sec. 950.01.

9. Require the offender to participate in a work-release or educational or vocational training program pursuant to Sec. 951.24 while serving a sentence in a county jail, if such a program is available.

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13. Impose a split sentence whereby the offender is to be placed in a county jail or county work camp upon the completion of any specified term of community supervision.

14. Impose split probation whereby upon satisfactory completion of half the term of probation, the Department of Corrections may place the offender on administrative probation pursuant to Sec. 948.01 for the remainder of the term of supervision.

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16. Impose any other sanction which is provided within the community and approved as an intermediate sanction by the county public safety coordinating council as described in Sec. 951.26.

Of particular importance are the statutory provisions contained in § 921.187(1)(a)(1)and (13)authorizing split nonprison sentences which include incarceration; the provision in § 921.187 (1)(a)2 authorizing any disposition provided by law; and the provisions in § 921.187(1)(a)5 authorizing placement in

community control as provided in Chapter 948 Fla. Stat. (1993).

The enactment of these provisions creating new nonprison sentencing options reinforces petitioner's argument that the legislature's deletion of the alternative nature of the old guideline cells and creation of the new guidelines divested of Davis its precedential value.

Summary

The certified question should be answered in the negative because the new law has eliminated the statutory provision upon which the lower tribunal based its decision. Further, Florida Rule of Criminal Procedure 3.702(b) provides that the where conflict exists between the new rule or statute and old caselaw, the caselaw is superseded by the new rule and statute. The caselaw dealing with disjunctive clauses in the old statute conflicts with the new statute which does not contain the language that was the basis for those decisions and the certified question. Therefore, the certified question should be answered in the negative, the opinion of the lower tribunal quashed and the judgement and sentence reinstated.

ISSUE II

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

Respondent has argued only that this Court should not accept jurisdiction and review this issue. Petitioner asserts that this Court should address this issue because the separation of powers issues presented by petitioner's reliance on Smith have not been addressed in this Court's prior decisions. As this Court has repeatedly recognized, separation of powers is absolutely required by Florida's constitution. B.H. v. State, 645 So.2d 987, 991 (Fla. 1994) Thus, this Court should address whether its decisions relying on committee notes to its rule may be used to override the legislature's determination that incarceration may be imposed as a condition of community control.

Therefore, this Court should exercise its jurisdiction and address this issue.

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 should be quashed, and the judgment and sentence entered in the trial court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing PETITIONER'S REPLY 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 24th day of May, 1996.

Edward C. Hill, Jr.
Assistant Attorney General

[A:\SIMMONS.BR --- 5/24/96,2:45 pm]