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IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

LEONARD S. PERRY,

Respondent.

CASE NO. 88,192

CERTIFIED QUESTION FROM THE DISTRICT COURT OF APPEAL
FIRST DISTRICT

PETITIONER'S INITIAL BRIEF ON THE MERITS

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

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COUNSEL FOR PETITIONER

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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, Leonard S. Perry, 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.

References to the record on appeal will be "R," to the sentencing transcript "TR."

This case presents the same issue as that currently pending before the Court in State v. Simmons, case 87,618

STATEMENT OF THE CASE AND FACTS

Respondent Perry was convicted of possession with intent to sell cocaine, a second degree felony punishable by fifteen years imprisonment. R26-27. The state sought an upward departure from the guidelines sentence of any nonstate sanction because the current offense had been committed within six months of his discharge from a release program (county jail) following conviction for grand theft auto. R23, TR321-327. Although expressing frustration at the inadequacy of the guidelines sentence, the trial court declined to depart and sentenced respondent to a term of one-year in county jail followed by two years of community control. TR328, R29-34. The record does not show any objection by respondent to the sentence or its characterization by the trial court as a non-departure sentence.

On appeal, the district court held that this was a departure sentence pursuant to its decision in Simmons v. State, 668 So. 2d 654 (Fla. 1st DCA 1996). The district court certified the same question as in Simmons:

> 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.

The certified question in Simmons is now pending before this Court in case no. 87,618.

SUMMARY OF ARGUMENT

ISSUE I.

The certified question should be answered no and the trial court sentence approved. A sentence of one year in county jail followed by two years community control is statutorily authorized by the revised 1994 sentencing guidelines and does not involve a state prison sentence. This sentence is within the statutory guidelines because it is a nonstate sanction.

ISSUE

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]

This argument, except for minor editorial changes, was made in State v. Simmons, case no 87,618 now pending before the Court[1].

The issue presented below was whether the trial court erred under the revised 1994 statutory guidelines when it imposed a one-year term of incarceration in the county jail followed by two years of community control. The district court determined that this sentence was a guidelines departure under its prior decision in Simmons v. State, 668 So. 2d 654 (Fla. 1st DCA 1996) which relied on prior cases of this Court interpreting the pre-1994 statute and certified the above question.

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[1]It is worth noting that respondent successfully argued against a departure sentence to state prison, made no objection to the ruling of the trial court or its sentence, but, having obtained the relief he sought, appealed successfully in the district court. He now appears in the state's highest court on an unpreserved issue and will no doubt seek additional error review on other issues. It is this type of abusive appeal which the **Criminal Appeal Reform Act of 1996** (CS/HB 211) and AMENDMENTS TO FLORIDA RULE OF APPELLATE PROCEDURE 9.020(g) AND FLORIDA RULE OF CRIMINAL PROCEDURE 3.800, case 86,881 (Fla. Issued 27 June 1996) are designed to prohibit.

In evaluating this question in Simmons v. State, 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 <u>any</u> authorized nonstate prison sanction without having to provide written departure reasons.

Here, petitioner's crime was a second degree felony committed in 1995 (R5) punishable by imprisonment of up to fifteen years. §§ 893.13(1)(a)1 and 775.082(3)(c). Because his guidelines score of 39.1 when multiplied by the permissible 1.15 was less than 40 (R 55-56), the statutory guidelines sentence was any penalty other than a state prison sentence. Rule 3.702(d)(16). 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. Both Community Control and incarceration in a county jail are nonstate sentences. If **either** was a nonstate sanction it would not be permitted under the faulty rationale of the district court below. Thus, the sentence imposed in the instant case was statutorily authorized and consistent with the revised 1994 sentencing guidelines which in pertinent part are not in the disjunctive.

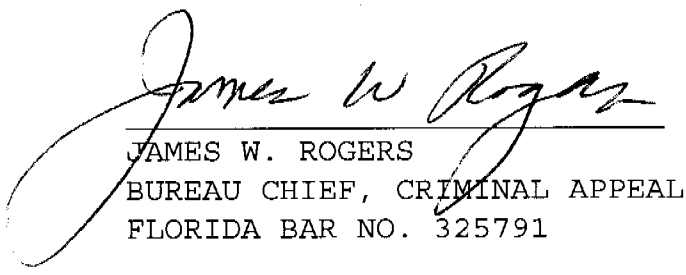
This Court should answer no to the certified question and quash the decision of the district court.

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 sentence entered in the trial court affirmed.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



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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 1st day of July, 1996.

JAMES W. ROGERS
COUNSEL FOR PETITIONER

[A:\PERRY.BI --- 7/1/96,9:38 am]

Appendix

96-110132
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IN THE DISTRICT COURT OF APPEAL

FIRST DISTRICT, STATE OF FLORIDA

LEONARD SYLVESTER PERRY,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

_____/

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

CASE NO. 95-4628

Opinion filed May 20, 1996.

An appeal from Circuit Court for Duval County.
Peter Fryefield, Judge.

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

Robert A. Butterworth, Attorney General; Vincent Altieri, Assistant Attorney General, Tallahassee, for Appellee.

Docketed
5-22-96

PER CURIAM.

Appellant raises two issues for our review. We affirm the first issue without further discussion. We reverse and remand for resentencing on the second issue.

Appellant was convicted of possession of cocaine and sentenced under the 1994 guidelines to one year in county jail followed by two years on community control based on a guidelines scoresheet

total of 34 points. As we explained in our opinion in Simmons v. State, 668 So.2d 654 (Fla. 1st DCA 1996), the trial court has imposed a departure sentence without written reasons. Accordingly, we remand for resentencing. We also certify the same question that we certified in Simmons:

> 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?

MINER and WEBSTER, JJ., and SMITH, Senior Judge, CONCUR.