IN THE SUPREME COURT OF FLORIDA

MICHAEL A. McEACHERN,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

CASE NO. 89,859

ON DISCRETIONARY REVIEW FROM
THE FIFTH DISTRICT COURT OF APPEAL

PETITIONER'S BRIEF ON THE MERITS

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

DEE BALL
ASSISTANT PUBLIC DEFENDER
FLORIDA BAR NO. 0564011
112 Orange Avenue, Suite A
Daytona Beach, FL 32114
(904) 252-3367

COUNSEL FOR PETITIONER

TABLE OF CONTENTS

TABLE OF CITATIONS

TABLE OF CITATIONS (Continued)

TABLE OF CITATIONS (Continued)

OTHER AUTHORITIES CITED:

IN THE SUPREME COURT OF FLORIDA

MICHAEL A. McEACHERN,	)	
	)	
Petitioner,	)	
	)	
vs.	)	CASE NO. 89,859
	)	
STATE OF FLORIDA,	)	
	)	
Respondent.	)	

STATEMENT OF CASE AND FACTS

The State charged Michael McEachern (Petitioner) with two counts of purchase of cocaine (Case No. 95-10517); burglary of a structure, grand theft, and dealing in stolen property (Case No. 95-12905); and dealing in stolen property and grand theft (Case No. 95-131 18). R. 20, 31, 38. Based upon a plea agreement negotiated with the trial court, Petitioner pled nolo contendere to one count of purchase of cocaine, one count of burglary of a structure, and two counts of dealing in stolen property. The State nol prossed the remaining charges. R. 54, 56, 58.

Petitioner scored 63.4 points for a guidelines range of 26.55 to 44.25 months. Although the State recommended a guidelines sentence, the trial judge honored the plea agreement and sentenced Petitioner to incarceration for 44.25 months, suspended upon successful completion of two years community control followed by three years supervised

probation, with credit for 134 days. As a condition of the sentence, Petitioner must successfully complete a residential drug/alcohol rehabilitation program. The trial court gave the following reasons for the sentence: Petitioner requires specialized treatment and is amenable to treatment. R. 75, 77, 83-91, 94-101, The State timely appealed. R. 138-140.

The Fifth District Court of Appeal reversed on the ground that Petitioner's sentence did not conform to the sentence categories enunciated in Poore v. State, 531 So. 2d 161 (Fla. 1988). State v. McEachern, 21 Fla. L. Weekly D2453 (Fla. 5th DCA November 15, 1996). Petitioner moved for rehearing en banc based upon the conflicting language in Pinardi v. State, 617 So. 2d 371 (Fla. 5th DCA 1993) (1992 amendment to Rule 3.986, Florida Rules of Criminal Procedure, apparently permits pure suspended sentence) and Bell v. State, 651 So. 2d 237 (Fla. 5th DCA 1995) (disagreeing with Pinardi) and upon the definition of an illegal sentence in Davis v. State, 661 So. 2d 1193 (Fla. 1995) and King v. State, 681 So. 2d 1126 (Fla. 1996). In the alternative, Petitioner requested certification of the following question: Are the sentencing categories enunciated in Poore v. State the only categories available to a trial court?

In its opinion on motion for rehearing, the court focused on illegal sentences and certified the following question:

> Is a sentence, entirely suspended on the condition that the defendant successfully complete community control, an illegal sentence as constituting an unauthorized sentencing alternative which may be appealed by the State and vacated on direct appeal?

State v. McEachern, 22 Fla. L. Weekly D323 (Fla. 5th DCA January 31, 1997). Petitioner timely filed a notice to invoke the jurisdiction of this Court.

SUMMARY OF ARGUMENT

The five basic sentencing alternatives in Poore v. State, 53 1 So. 2d 161 (Fla. 1988) are not all-inclusive. Suspended sentences are authorized by Section 948.01, Florida Statutes (1995) and have been approved by the Second and First Districts as true split sentences.

ARGUMENT

THE DISTRICT COURT OF APPEAL ERRED BY REVERSING THE SENTENCE IMPOSED BY THE TRIAL COURT.

Petitioner scored 63.4 points for a guidelines range of 26.55 to 44.25 months, The trial court sentenced Petitioner to 44.25 months, suspended upon successful completion of two years community control followed by three years probation with credit for 134 days. The certified question framed by the district court of appeal focuses on this Court's definition of an illegal sentence as it affects the State's right to appeal. This Court has identified three types of sentencing errors: (1) an erroneous sentence which is correctable on direct appeal; (2) an unlawful sentence which is correctable only after an evidentiary hearing under Rule 3.850; and (3) an illegal sentence in which the error must be corrected as a matter of law in a Rule 3.800 proceeding. State v. Callaway, 658 So. 2d 983 (Fla. 1995). But for the opinions of the Fifth District that any sentence not identified in Poore v. State, 531 So. 2d 161 (Fla. 1988) is illegal, Petitioner's sentence would be an erroneous sentence correctable on direct appeal. Rule 9.140(c)(1)(J), Florida Rules of Appellate Procedure, and Sections 921.0016(2), 924.06(1)(e), and 924.07(1)(i), Florida Statutes (1995), permit appeals by both the State and the defendant of sentences outside the recommended guidelines, Petitioner respectfully suggests that this Court need not reach the issue as framed by the district court. The proper issue is whether a suspended sentence is a viable sentencing alternative in Florida.

Poore concerned a resentencing after a violation of probation. In this Court listed five basic sentencing alternatives and discussed the options of a trial court at

resentencing. Although nothing in Poore indicates that the five alternatives are all-inclusive, the Fifth District Court of Appeal adopted the position that any sentence other than one of the five is an illegal sentence, Bryant v. State, 591 So. 2d 1102, 1103 (Fla. 5th DCA 1992); Pinardi v. State, 617 So. 2d 371 (Fla. 5th DCA 1993); State v. Conte, 650 So. 2d 192 (Fla. 5th DCA 1995); and Warrington v. State, 660 So. 2d 385 (Fla. 5th DCA 1995).

Conversely, the Second District Court of Appeal has approved suspended sentences as true split sentences. Silva v. State, 602 So. 2d 694 (Fla. 2d DCA 1992) (sentence of ten years imprisonment with entire confinement period suspended and defendant placed on probation for ten years is true split sentence); Lee v. State, 666 So. 2d 209 (Fla. 2d DCA 1995) (sentence of 22 years imprisonment, entirely suspended, and defendant placed on community control for 21 months followed by probation for five years is true split sentence); State v. Powell, 22 Fla. L. Weekly D389 (Fla, 2d DCA February 5, 1997) (sentence of 12 years imprisonment, suspended, with two years community control followed by four years probation is a true split sentence). In Powell the district court concluded that Poore merely summarized the complex statutory sentencing options available in 1988, found that the legislature has not precluded a totally suspended sentence, and acknowledged conflict with the Fifth District.[1]

Like the Second, the First District Court of Appeal has approved suspended sentences. See e.g., Helton v. State, 611 So. 2d 1323 (Fla. 1st DCA 1993) (original sentence was true

[1] The court certified the following questions: (1) If there exists a valid reason for a downward departure, may a trial court impose a true split sentence in which the entire period of incarceration is suspended? and (2) May a trial court impose a true split sentence in which the period of community control and/or probation is shorter than the suspended portion of incarceration? State v. Powell, supra.

split sentence even though entire period of confinement suspended); Jefferson v. State, 677 So. 2d 29 (Fla. 1st DCA 1996) (sentence of 18 months suspended with probation in lieu thereof is true split sentence) .[2]

Suspended sentences have been permitted under Section 948.01, Florida Statutes. See. e.g., Phillips v. State, 394 So. 2d 233 (Fla. 1st DCA 1981) (Section 948.01 permits a suspended sentence); McGuirk v. State, 382 So. 2d 1235 (Fla. 1980) (sentence of 6 to 28 months suspended except for time served with probation for three years permitted by §§ 948.01(3) and (4)). In this regard, Chapter 948 has not changed substantially since 1980. Section 948.01(6) now provides that when imprisonment is prescribed, the court, in its discretion, may impose a split sentence and place the defendant on probation or community control "upon completion of any specified period . . . which may include a term of years or less." As discussed in Powell, the statute does not determine a minimum period of incarceration; however, the Fifth and First Districts have concluded that the suspended portion must equal the probation. See, State v. Davis, 657 So. 2d 1224 (Fla. 5th DCA 1995); State v. Farthing, 652 So. 2d 1290 (Fla. 5th DCA 1995); State v. Conte, 650 So. 2d 192 (Fla. 5th DCA 1995), rev. denied, 659 So. 2d 270 (Fla. 1995); Gaskins v. State, 607 So. 2d 475 (Fla. 1st DCA 1992). That requirement is satisfied in this case where the trial court imposed supervision for 60 months in lieu of incarceration for 44.5 months.

---

[2] The court certified the following question: Where a defendant is sentenced to a true split sentence, as defined in Poore v. State, [citation omitted], and upon violation of probation, resentenced to a period of incarceration which exceeds the original sentence imposed, but does not exceed the statutory maximum for that offense, is the new sentence "illegal" within the meaning of Davis v. State, 661 So, 2d 1193 (Fla. 1995), for the purposes of Florida Rule of Criminal Procedure 3.800(a)? Jefferson at 30.

The 1992 amendment to Rule 3.986, Florida Rules of Criminal Procedure, also appears to authorize a suspended sentence. Rule 3.986 now provides:

> To Be Imprisoned (check one; unmarked sections are inapplicable):
>
> ____ For a term of natural life.
>
> ____ For a term of _____
>
> ____ Said SENTENCE SUSPENDED for a period of _____ subject to conditions set forth in this order,

See, Pinardi. supra (1992 amendment to Rule 3.986 apparently permits pure suspended sentence); but see, Bell v. State, 651 So. 2d 237 (Fla. 5th DCA 1995) (disagreeing with Pinardi).

In addition to Section 948.01(6) and Rule 3.986, Section 958.06, Florida Statutes (1995) expressly authorizes a suspended sentence for youthful offenders, and Section 921.0014, Florida Statutes (1995) permits the state attorney to move for suspension of a sentence if the offender provides substantial assistance. In other statutes, the legislature has recognized a suspended sentence by expressly excluding it. See, e.g., § 775.0823, Fla. Stat. (1995) (violent offenses against law enforcement officers and others shall not be suspended, deferred, or withheld); § 784.08, Fla. Stat. (1995) (assault or battery on persons 65 or older shall not be suspended, deferred, or withheld); §§ 893.13, 893.135, and 893.20, Fla. Stat. (1995) (imposition of sentence for certain drug offenders may not be suspended or deferred nor shall the defendant be placed on probation).

In addition to the alternatives enunciated in Poore, this Court recently approved a negotiated sentence not specifically authorized by statute (King v. State, 681 So. 2d 1136 (Fla.

1996)), and the legislature has authorized a reverse split sentence (§ 948.01(11), Fla. Stat. (1995); see also, Disbrow v. State, 642 So. 2d 740 (Fla. 1994)). Further, Section 921.187, Florida Statutes (1995) allows a trial court to, *inter alia*, place a defendant into community control, assess fines, require public service, or make any disposition authorized by law. [3] By expressly permitting any disposition authorized by law, a strong inference exists that neither Poore nor Section 921.187 contains an exclusive list of sentencing alternatives.

This Court has stated that a sentence may be suspended based upon mitigating circumstances and other sufficient cause. Ex Parte Williams, 26 Fla. 310, 8 So. 425 (1890). Those mitigating circumstances are now codified in Section 921.0016(4), Florida Statutes (1995). A departure from the guidelines is justified where the defendant requires specialized treatment for addiction and is amenable to treatment. The trial judge found that Petitioner requires specialized treatment and that he is amenable to treatment, and the sentence imposed should be affirmed.

---

[3] Petitioner notes that fines, public service, and community control were not discussed in Poore, and under the rationale of the Fifth District should be illegal sentences.

CONCLUSION

Based upon the argument presented and the authorities cited, this Court should reverse the decision of the district court and affirm the trial court.

Respectfully submitted,

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

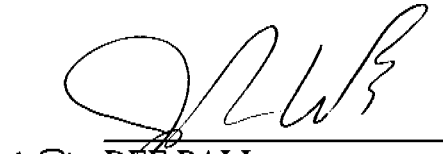
JAMES R. WULCHAK
FL BAR No. 0249238

FOR: DEE BALL
ASSISTANT PUBLIC DEFENDER
Florida Bar No. 0564011
112 Orange Avenue, Suite A
Daytona Beach, FL 32114
(904) 252-3367

COUNSEL FOR PETITIONER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand-delivered to the Honorable Robert A. Butterworth, Attorney General, 444 Seabreeze Boulevard, Fifth Floor, Daytona Beach, FL 32118, via his basket at the Fifth District Court of Appeal and mailed to; Mr. Michael A. McEachern, c/o Daytop, P.O. Box 1317, Citra, FL 32113, this 12th day of March, 1997.



FOR: DEE BALL
ASSISTANT PUBLIC DEFENDER