

IN THE SUPREME COURT OF FLORIDA

CASE NO. 74,562

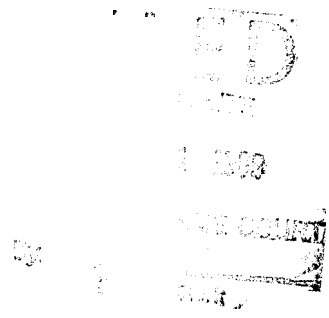
STATE OF FLORIDA,

Petitioner,

vs.

MARCUS REED,

Respondent.



AN APPEAL FROM THE FOURTH DISTRICT COURT
OF APPEAL OF THE STATE OF FLORIDA

PETITIONER'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner was the State, or prosecution, in the trial of this case in the Criminal Division of the Nineteenth Judicial Circuit, in and for Martin County, Florida, and the Appellee before the Fourth District Court of Appeal, Reed v. State, 545 So.2d 891 (Fla. 4th DCA 1989). Respondent was the defendant in the trial court and was the Appellant before the district court, Reed v. State. Petitioner has invoked the discretionary jurisdiction of this Court pursuant to a certified question as an issue of great public importance.

The symbol "R" refers to the record on appeal.

STATEMENT OF THE CASE AND FACTS

Respondent was charged by information, September 2, 1987, with Count I, possession of a controlled substance, and Count 11, sale or delivery of a controlled substance on August 14, 1987. (R 13) He pled no contest to the charge of possession with the intent to sell. (R 35-40) A sentencing guideline scoresheet was computed which indicated eighty points and a recommended sentence of community control or twelve to thirty months incarceration. (R 41)

At sentencing, March 23, 1988, judgment was entered, and Respondent was sentenced to community control for one year followed by two years of probation. (R 3-5, 43-46, 56)

Respondent appealed his sentence to the Fourth District Court of Appeal by timely notice, April 5, 1988. (R 54) The District Court entered an opinion, January 25, 1989, reversing the sentence and remanding the cause for resentencing within the guidelines. The Court certified the following question as one of great public importance:

WHEN SENTENCING WITHIN THE
GUIDELINES, MAY A TRIAL COURT
IMPOSE A SENTENCE OF
COMMUNITY CONTROL TO BE
FOLLOWED BY PROBATION IF THE
TOTAL SENTENCE DOES NOT
EXCEED THE TERM PROVIDED BY
GENERAL LAW?

SUMMARY OF THE ARGUMENT

Conflict exists amongst the district courts as to whether, when sentencing a defendant within the recommended sentencing guidelines range of twelve to thirty months incarceration or community control, the trial court may impose a sentence of community control followed by probation. This Court's adoption of the 1985 amendments to the Florida Rules of Criminal Procedure clearly indicates approval of sentences of community control followed by probation. Such a sentence may impose a period of community control, not to exceed twenty four months, and a combined sanction of both sentencing dispositions not to exceed the term provided by general law. The trial court order, therefore, imposing a sentence upon Respondent of one year community control plus probation, was not a departure sentence requiring written reasons in support thereof, and must be approved by this Court.

ARGUMENT

ISSUE

THE IMPOSITION OF A SENTENCE
OF ONE YEAR COMMUNITY
CONTROL, FOLLOWED BY TWO
YEARS' PROBATION, WAS WITHIN
THE RECOMMENDED GUIDELINES
AND DID NOT EXCEED THE TERM
PROVIDED BY GENERAL LAW

Respondent was charged by information with Count I, possession of a controlled substance, §893.13(1)(e), Fla.Stat. (1987), and Count 11, sale or delivery of a controlled substance, §893.13(1)(a), Fla. Stat.(1987). (R 13) He pled nole contendere to possession of cocaine with intent to sell, §893.13(1)(a)1., 893.03(2)(a)4., Fla.Stat.(1987). (R 35-40) He was adjudicated guilty of a second degree felony, §893.13(1)(a)1., which subjected him to a sentence of imprisonment not exceeding fifteen years, §775.082(3)(c), Fla.Stat. (1987). (R 43) His sentencing guidelines scoresheet indicated a recommended sentence of community control or twelve to thirty months incarceration, Fla.R.Crim.P. 3.988(g). (R 41). The trial court sentenced Respondent to one year of community control to be followed by two years' probation. (R 45-46, 56)

A. **A SENTENCE OF COMMUNITY CONTROL
MAY BE FOLLOWED BY A TERM OF PROBATION**

Although the district courts are in conflict as to whether a trial judge, when sentencing within the guidelines cell that recommends incarceration or community control, may impose a sentencing scheme combining these forms of punishment, this

Court, by approving an amendment to the rules of criminal procedure, has clarified the issue. According to the 1985 amendment to Fla.R.Crim.P. 3.701(d)(13), regulating the sentencing guidelines, the committee note explains that community control may be a viable alternative for any state prison sanction less than twenty-four months without requiring a departure reason, The Florida Bar Re: Rules of Crim.Proc., 482 So.2d 311, 317 (Fla. 1985). Furthermore, the note indicates that community control may be followed by probation but that the combined total of community control plus probation shall not exceed the term provided by general law, *id.*

The differing opinions on this issue emanate from a First District decision which found community control and probation to be alternate forms of disposition that could not be imposed in tandem, Williams v. State, 464 So.2d 1218 (Fla. 1st DCA 1984), accord, Chessler v. State, 467 So.2d 1102 (Fla. 4th DCA 1985). In Williams, the defendant had been sentenced to community control for two years followed by six years of probation. The court found the sentencing scheme imposed was "manifestly contrary to the legislative intent as to the proper purpose and application of these alternative dispositions." *id.* 464 So.2d at 1220. Such reasoning was rejected by the Second District in Burrell v. State, 483 So.2d 479 (Fla. 2d DCA 1986). According to Burrell at 481, community control is a more restrictive form of probation and is also supervised by the Department of Probation and Parole. Additionally, violations of both sanctions

are subject to the same disposition, id. Reasoning that community control, similarly to probation, represents an intermediate step in the rehabilitation of the offender, the court approved the sentence of two years' incarceration, followed by six months' community control and two years' probation. A Fifth District opinion, Petras v. State, 486 So.2d 44, 45 (Fla. 5th DCA 1986), soon thereafter recognized the above referenced criminal procedure rule amendment, and committee note, allowing community control and probation to be imposed consecutively, and affirmed a sentence imposing two years' community control, plus sixty days in jail, followed by three years' probation. Petras relied upon Burrell and Smith v. State, 481 So.2d 581 (Fla. 1986), an opinion of this Court which approved a sentencing scheme of jail, probation and community control, accord, Skeens v. State, 542 So.2d 436 (Fla. 2d DCA 1989). Recently, the Fourth District recognized that the committee note conflicted with Chessler and, for that reason, certified the issue on appeal, Reed v. State, 545 So.2d 891 (Fla. 4th DCA 1989). The First District, however, continues to adhere to Williams and has held that the committee note did not alter the statutory scheme of §§921.187, 948, Fla. Stat. (1987), Denson v. State, 14 F.L.W. 2053 (Fla. 1st DCA Sept. 1, 1989).

It is well recognized that community control is a more harsh and severe alternative to ordinary probation, State v. Mestas, 507 So.2d 587, 588 (Fla. 1987); Williams; Burrell. According to their respective definitions:

(1) "Community control" means a form of intensive, supervised custody in the community, including surveillance on weekends and holidays, administered by officers with restricted caseloads. Community control is an individualized program in which the freedom of an offender is restricted within the community, home, or noninstitutional residential placement and specific sanctions are imposed and enforced.

(2) "Probation" means a form of community supervision requiring specified contacts with parole and probation officers and other terms and conditions as provided in 6948.03.

§948.001, Fla.Stat. (1987). The court may, in its discretion, stay or withhold adjudication of guilt and place a defendant upon probation, if the court decides that the defendant is not likely to again engage in criminal conduct, and that neither justice nor the welfare of society require his suffering the penalty imposed by law, §948.01(3). Community control may be imposed when probation is an unsuitable dispositional alternative to imprisonment, §948.01(4). Probation and community control are also disposition and sentencing alternatives, §921.187(1)(a),(b),(c). According to Williams, the harsher terms of community control preclude consecutive application of these dispositional alternatives. Burrell, however, considers community control a more restrictive form of probation and,

thereby, a proper intermediate step between incarceration and the restricted freedom of probation.

The legislative committee note to Fla.R.Crim.P. 3.701(d)(13) has clearly indicated its agreement with Burrell, that community control may, in certain instances, be a preferable sentencing alternative to straight probation, and may appropriately precede a term of probation. This Court has already indicated its recognition of such reasoning by its approval of the 1985 amendments to The Florida Rules of Criminal Procedure, 482 So.2d at 317.

The case at bar exemplifies an appropriate circumstance for the imposition of a sentence of community control to be followed by probation. Pursuant to a plea bargain, Respondent was pleading no contest to possession of cocaine with the intent to sell, and the State was recommending a three year probationary sentence. (R 3) The trial court was aware that he could sentence Respondent to incarceration of twelve to thirty months or community control but that the State was recommending a reduced sentence pursuant to the terms of the plea bargain. Recognizing that pure probation was not restrictive enough for Respondent, the court imposed community control, a harsher penalty, to be followed by probation. Such a sentencing scheme should be permitted to allow the courts a dispositional alternative to straight probation when the court determines incarceration unsuitable but recognizes the necessity for an intermediate step in the offender's rehabilitation before releasing him to the freedoms of probation, Burrell.

B. A SENTENCE OF COMMUNITY CONTROL FOLLOWED BY PROBATION IS PERMITTED WHEN BOTH SANCTIONS COMBINED DO NOT EXCEED THE TERM PROVIDED BY GENERAL LAW

It has already been determined that community control may be imposed for a state prison sentence less than twenty four months, and that a sentence imposing community control and probation shall not exceed the term provided by general law, see, committee note, Fla.R.Crim.P. 3.701(d)(13). The community control portion of a sentence may not exceed two years, §948.01(5), Fla.Stat. (1987), and the total sanction of the combined sentences shall not exceed the statutory maximum penalty, Fla.R.Crim.P. 3.701(d)(13). A hybrid sentence of this nature is a probationary sentence, and not a split sentence, Poore v. State, 531 So.2d 161 (Fla. 1988). Therefore, since no incarceration has been imposed, the guidelines limitation on the incarceration portion of the sentence does not apply, Fla.R.Crim.P. 3.701(d)(12), Putt v. State, 527 So.2d 914 (Fla. 3d DCA 1988).

This Court has determined sentencing schemes combining incarceration and community control to be a guidelines departure when the recommended guidelines range was community control or twelve to thirty months incarceration, Welch v. State, 530 So.2d 225 (Fla. 1988), Van Kooten v. State, 522 So.2d 830 (Fla. 1988). These authorities review sentences in which the total sanction combining community control and incarceration exceeded the maximum guidelines incarceration period of thirty months, disapproving Francis v. State, 487 So.2d 348 (Fla. 2d DCA),

review denied, 492 So.2d 1332 (1986), and approving Johnson v. State, 511 So.2d 748 (Fla. 5th DCA 1987), approved, 522 So.2d 883 (1988). This reasoning disapproves of the imposition of community control, instead of probation, to extend a sentence beyond the recommended guidelines range, but does not reject the imposition of both incarceration and community control when the total sanction is within the recommended range of thirty months, Ewing v. State, 526 So.2d 1024 (Fla. 1st DCA 1988). These authorities do not bar a guidelines sentence of community control less than twenty four months, plus probation, when the total sanction does not exceed the term provided by general law.

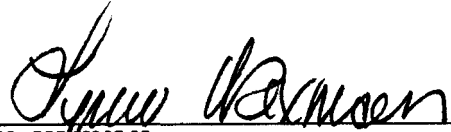
It is quite clear, therefore, that since the community control portion of the sentence cannot exceed twenty four months, and that the combined sanctions of the sentence must remain within the term provided by general law, a sentencing scheme imposing them in combination must be recognized by this Court. A sentence combining them both, as in the instant case, is not, therefore, a departure sentence requiring written reasons in support thereof, Sanchez v. State, 538 So.2d 923 (Fla. 5th DCA 1984).

CONCLUSION

Based upon the foregoing reasons and citations of authority, it is respectfully requested that this Honorable Court answer the certified question in the affirmative and approve the sentence imposed by the trial court, which has been reversed by the Fourth District Court of Appeal.

Respectfully submitted,

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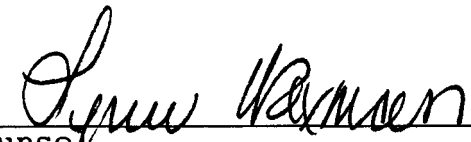


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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing "Petitioner's Brief on the Merits" has been furnished by courier to: ALLEN DeWEESE, ESQUIRE, Assistant Public Defender, The Governmental Center, 301 N. Olive Avenue, Ninth Floor, West Palm Beach, Florida 33401, this 10th day of October, 1989.


Of Counsel