

IN THE SUPREME COURT OF FLORIDA

CASE NO. 74,562

STATE OF FLORIDA,

Petitioner,


vs.

MARCUS REED

Respondent

**FILED**  
SID J. WHITE

NOV 27 1989

CLERK, SUPREME COURT  
By   
Deputy Clerk

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

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PETITIONER'S REPLY BRIEF ON THE MERITS

ROBERT A. BUTTERWORTH  
Attorney General  
Tallahassee, Florida/

**LYNN WAXMAN**  
Assistant Attorney General  
Florida Bar #795010  
111 Georgia Avenue, Suite 204  
West Palm Beach, Florida 33401  
Telephone: (407) 837-5062

Counsel for Petitioner

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PRELIMINARY STATEMENT

Petitioner relies on the Preliminary Statement as found in its Initial Brief on the Merits in this case.

STATEMENT OF CASE AND FACTS

Petitioner adopts the Statement of the Case and Facts as presented in its Initial Brief on the Merits in this cause.

SUMMARY OF ARGUMENT

The inconsistency in the sentencing guidelines sub judice arises from differing language in two Rules of Criminal Procedure, Rule 3.701(d)(13) and Rule 3.988(g). The committee note in Rule 3.701(d)(13), which allows the imposition of probation and community control in tandem, was adopted by this Court and became part of the Rules of Criminal Procedure in 1985. This amended rule modifies and supersedes the guidelines range in Rule 3.988(g), which allowed a sentence of community control or twelve to thirty months incarceration.

ARGUMENT

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.

The conflict at issue on this appeal arises between two rules of criminal procedure, and not between a statute and rule, as argued by Respondent.

Respondent was sentenced on a nole contendere plea to the charge of possession of cocaine with intent to sell. §893.13(1)(a) 1., 839.03(2)(a) 4., Fla. Stat. (1987). (R. 35-40) He was sentenced according to the Florida sentencing guidelines, category seven scoresheet, for drug offenses pursuant to Chapter 893, Fla.R.Crim.P. 3.988 (g). (R. 41) His recommended range indicated a sentence of community control or twelve to thirty months incarceration, however, he was sentenced to one year of community control to be followed by two years' probation. (R. 45-46, 56)

The sentencing guideline scoresheet and recommended sentencing range at issue are part of the rules of criminal procedure proposed to implement the sentencing guidelines in order to comply with the passage of §921.001, Fla. Stat. (1983), In re Rules of Criminal Procedure (Sentencing Guidelines), 439 So.2d 848 (Fla. 1983). Rules 3.701 a.-d., (1.-13), and 3.988

(a)-(i) were adopted by this court on that date. The amendment to Rule 3.701(d)(13), the committee note which indicates that community control may be followed by probation but that the combined total of the two sanctions shall not exceed the term provided by general law, was later adopted by this court, The Florida Bar re: Rules of Crim. Proc., 482 So.2d 311, 317 (Fla. 1985). The conflict sub judice, therefore, arises from an inconsistency between two rules of procedure.

The committee note to rule 3.701(d)(13) has been adopted by this court and has become part of the Florida Rules of Criminal Procedure, The Florida Bar re: Rules of Crim. Proc., 482 So.2d at 312. Florida law has considered committee notes in the sentencing guidelines as part of the guidelines, which are part of the Florida Rules of Criminal Procedure, Foister v. State, 536 So.2d 1130, 1131 n. 4 (Fla. 1st DCA 1987), Slappy v. State, 516 So.2d 342, 344 (Fla. 1st DCA 1987), compare, Putt v. State, 527 So.2d 915 (Fla. 3d DCA 1988) (committee notes are not binding, but a valuable aid in the application of criminal rules.)

Furthermore, the amendment to Rule 3.701(d)(13) which became effective in 1985 supersedes all conflicting rules, Harris v. State, 400 So.2d 819 (Fla. 5th DCA 1981). Rules promulgated by the Supreme Court, dealing with the same subject matter, should be construed consistently to avoid incongruous results,

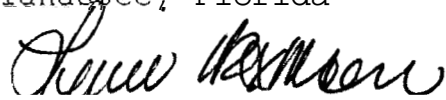
Dibble v. Dibble, 377 So.2d 1001 (Fla. 3d DCA 1979), Jones v. Seaboard C.L.R., 297 So.2d 861 (Fla. 2d DCA 1974). The 1985 amendment to Rule 3.701(d)13, therefore, modifies, and takes precedent over, the recommended sentence in Rule 3.988(g) which permits community control or twelve to thirty months incarceration. The amendment clearly approves a sentence which imposes community control plus probation.

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,

ROBERT A. BUTTERWORTH  
Attorney General  
Tallahassee, Florida

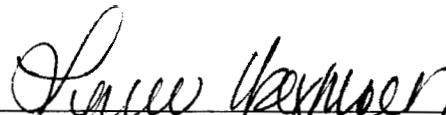


LYNN WAXMAN  
Assistant Attorney General  
Florida Bar #795010  
111 Georgia Avenue, Suite 204  
West Palm Beach, Florida 33401  
Telephone: (407) 837-5062

Counsel for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Petitioner's Reply 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, FL 33401 this 22nd day of November, 1989.

  
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Of Counsel