FILED

IN THE SUPREME COURT OF FLORIDA

NOV 14 1983

SID J. WHITE
CLERK SUPREME COURT
By _____
Chief Deputy Clerk

VENDUL OLIVER STAFFORD,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

CASE NO. 64,394

RESPONDENT'S BRIEF ON JURISDICTION

JIM SMITH
ATTORNEY GENERAL

W. BRIAN BAYLY
ASSISTANT ATTORNEY GENERAL
125 N. Ridgewood Avenue
Fourth Floor
Daytona Beach, Florida 32014
(904) 252-2005

COUNSEL FOR RESPONDENT

TOPICAL INDEX

AUTHORITIES CITED

QUESTION PRESENTED

WHETHER THE DECISION OF THE DISTRICT COURT OF APPEAL, FIFTH DISTRICT IN THE CASE AT BAR EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISIONS OF THOMAS V. STATE, 434 SO.2D 20 (FLA. 2D DCA 1983); JOHNSON V. STATE, 419 SO.2D 752 (FLA. 2D DCA 1982); AND VILLERY V. FLORIDA PAROLE AND PROBATION COMMISSION, 396 SO.2D 1107 (FLA. 1981), THEREBY INVOKING THE DISCRETIONARY REVIEW JURISDICTION OF THIS COURT PURSUANT TO ARTICLE V, SECTION 3(b)(3) OF THE CONSTITUTION OF FLORIDA, AND RULE 9.030(a)(2)(A)(iv), FLORIDA RULES OF APPELLATE PROCEDURE.

In order to determine whether or not discretionary jurisdiction vests in the case sub judice with this Honorable Court, it will be necessary first to examine the case at bar and compare the facts and holdings with the cases that Petitioner contends expressly and directly conflict with the case sub judice. Then it will be necessary to compare the facts and holdings of these decisions to the applicable case law.

Stafford v. State, ___ So.2d ___, Case No. 82-891 (Fla. September 15, 1983) [8 FLW 2313] is the case at bar in which Petitioner contends is in conflict with other Second District Court of Appeal decisions as well as Villery v. Florida Parole and Probation Commission, 396 So.2d 1104 (Fla. 1981). In Stafford, petitioner was sentenced to five years imprisonment for burglary. On a separate charge of grand theft during the same sentencing procedure, the Petitioner received

five years of probation which was to run consecutively with the five years imprisonment on the burglary information. Petitioner was placed on parole on the burglary charge prior to the five year sentence of imprisonment terminating. During this period the probation officer filed an affidavit of violation of probation against Petitioner on January 15, 1982 (Exhibit 1). The trial court found Stafford guilty of violating his probation and the present appeal ensued to the Fifth District Court of Appeal.

While the Fifth District Court of Appeal in Stafford acknowledged Petitioner's reliance on the cases allegedly in conflict with the case sub judice, nevertheless the Fifth District Court of Appeal relied on Martin v. State, 243 So.2d 189 (Fla. 4th DCA 1971) and its progeny. The Martin case held that a probationer during the interval between the date of an order of probation and subsequent date when the probationary term was to commence could not violate his probation in that interval and if that defendant did so, he was subject to court process on a violation of probation. The Fifth District Court of Appeal in the case sub judice did not expressly overrule Villery, Thomas v. State, 434 So.2d 20 (Fla. 2d DCA 1983), or Johnson v. State, 419 So.2d 752 (Fla. 2d DCA 1982).

In Villery, supra, an inmate incarcerated for two and one-half years as a condition of probation for pleading guilty to five counts of knowingly issuing worthless checks

in excess of fifty dollars in violation of §832.05 Fla. Stat. (1979) sought a writ of mandamus. All sentences ran concurrent. This Honorable Court granted the writ. The holding in Villery was that this was an illegal sentence because a sentence of this nature (whether it is imprisonment as a condition of probation or whether it is a split sentence) divests the parole board of his exclusive authority to parole a prisoner pursuant to §947.16(1) Fla. Stat. (1979). The end result of the Villery decision was that the maximum period of incarceration which could be imposed as a condition of probation did not maintain that a parole date must expire in order for a probationary period to commence. Indeed, since the sentences in Villery were all concurrent, it was not necessary for this Honorable Court to make that determination. Villery speaks only to an illegal sentence; not when a sentence of imprisonment ends and when a probationary which is consecutive to that imprisonment sentence commences. In the case sub judice there is no contention that the sentence itself is illegal or that the trial judge has impinged or infringed on the exclusive authority of the parole commission pursuant to §947.16(1) Fla. Stat. (1981).

In Johnson, supra, the Petitioner contends that this case is in express and direct conflict with the case sub judice. In the Johnson case the defendant was sentenced on aggravated assault and aggravated battery to concurrent five year terms of actual imprisonment on February 17, 1975. On

March 4, 1975 the defendant was sentenced to three year terms of probation to begin at the end of the five year imprisonment term pursuant to the aggravated assault and aggravated battery charges. The defendant was actually placed on parole on January 31, 1978 or about three years prior to the end of his imprisonment term. On January 31, 1980 the parole term of the defendant expired. On April 2, 1981 an affidavit was filed charging that the defendant had violated his probation on the prostitution charges and the defendant was found guilty of that violation and appealed the sentence therefrom.

The defendant, in Johnson, contended that his probationary period began when he was released on parole on January 31, 1978. Under the defendant's theory, therefore, he would not be on probation for five years on April 2, of 1981 when the affidavit of violation of probation was filed. The Second District Court of Appeal affirmed the conviction and sentence for the violation of probation. The Second District Court of Appeal held that the trial court did have jurisdiction since the probation term commenced either at the expiration of the imprisonment term or when the parole expired, whichever came first. This holding by the Second District Court of Appeal was for the purpose of determining whether there was jurisdiction or not. In the case sub judice it was not necessary for the Fifth District Court of Appeal to determine whether or not the sentence for the burglary had expired (either by a parole expiration date or the actual

imprisonment sentence being completed) in order to determine whether or not the trial court had jurisdiction to hear a violation of probation charge. In other words, the issues in the two cases are entirely different. In Johnson the issue is whether a parole period must expire for a probation period to commence. In the case sub judice the issue is whether a probation period can overlap a parole period.

In Thomas, supra, the defendant received one sentence of ninety-nine years imprisonment with the imprisonment to be suspended after fifteen years and probation to commence thereafter for life. Again the issue and holding that the Second District Court of Appeal reached was whether a probation period commences upon the expiration of a parole period. Again in the case sub judice, the issue and holding plainly relates to whether a probation period can overlap with a parole period. There is no jurisdictional issue involved nor is there a question as there was in the Thomas case whether or not the sentence is illegal.

At this juncture, it would be appropriate to examine cases involving the issue of discretionary review pursuant to Art. V, §3(b)(3) of the Constitution of Florida and Fla. R. App. P. 9.030(a)(2)(A)(iv). Nieman v. Nieman, 312 So.2d 733 (Fla. 1975) involved a dissolution of marriage whereby Petitioner claimed that there was a direct and express conflict between district court of appeal decisions. This Honorable Court discharged the writ and held that in denying or

granting such a petition, the Supreme Court would look to the decision and not the opinion of the lower courts.

Mancini v. State, 312 So.2d 732 (1975) was another case involving the same issue. The defendant was sentenced for possession of marijuana and appealed to the Fourth District Court of Appeal which affirmed his conviction. The defendant then attempted to invoke the discretionary jurisdiction of this Honorable Court. The Supreme Court discharged the writ and held that since there was no evidence that Petitioner was not in exclusive control of the automobile where the controlled substance was found there was no express and direct conflict with other district court of appellate decisions. This Honorable Court noted two instances where this type of discretionary jurisdiction would be granted. The first is where there is an announcement of a rule of law which conflicts with a law previously promulgated and announced by the Supreme Court or another district court of appeal. The second example would be the application of the rule of law to produce a different result in a case which involves substantially the same facts as a prior case. In the case sub judice, and the cases that allegedly are in express and direct conflict with the Stafford case there are different factual situations, different issues, and looking to the decisions only, different holdings altogether.

CONCLUSION

For all the above reasons, Respondent would request this Honorable Court approve the decision of the Fifth District Court of Appeal in Stafford v. State, supra.

Respectfully submitted,

JIM SMITH
ATTORNEY GENERAL

W. Brian Bayly

W. BRIAN BAYLY
ASSISTANT ATTORNEY GENERAL
125 N. Ridgewood Avenue
Fourth Floor
Daytona Beach, Florida 32014
(904) 252-2005

COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by mail to James R. Wulchak, Esquire, Assistant Public Defender, Chief, Appellate Division, 1012 South Ridgewood Avenue, Daytona Beach, Florida 32014-6183, this 9th day of November, 1983.

W. Brian Bayly

Of Counsel for Respondent
W. Brian Bayly