OA 6.4.84

IN THE SUPREME COURT OF FLORIDA

VENDUL OLIVER STAFFORD,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

CASE NO. 64,394

RESPONDENT'S BRIEF ON THE MERITS



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## TOPICAL INDEX

## AUTHORITIES CITED



## OTHER AUTHORITIES

## STATEMENT OF THE CASE AND FACTS

Respondent accepts the Statement of the Case and Facts as set out in Petitioner's Brief on the Merits in this cause.

## ARGUMENT

THE TRIAL COURT HAS THE DISCRETION TO VIOLATE THE PETITIONER FOR A PROBATION VIOLATION WHILE PETITIONER IS ON PAROLE FOR A SEPARATE OFFENSE.

Petitioner contends when he was released on parole for burglary (Count II of the Information; R 85), he could not commence his probation term for grand theft (Count I of the Information) until his parole term had expired for the burglary offense. In advancing this premise, Petitioner argues that the holding in Stafford v. State, 437 So.2d 232 (Fla. 5th DCA 1983) be overruled. In support of this contention, Petitioner critiqued the Stafford case as follows:

> To follow the District Court's ruling would be to allow the defendant to be punished three times for the single transgression: parole revocation, probation revocation, and new substantive criminal charges.

(See Petitioner's Brief on the Merits at pages 5-6)

Initially, Respondent would take umbrage with the characterization of three (3) separate offenses as a "single transgression". Respondent would hasten to add that the Petitioner is being "punished three times" for three separate and distinct offenses. Petitioner was on parole for a burglary, probation for a grand theft, and whatever punishment or sentence to be imposed by a trial court for the new substantive offenses. Under § 775.021(4), a defendant may be sentenced separately on two (2) or more criminal charges if "each offense requires proof of an element that the other does not." There is no question that it is proper for the judge in the case sub judice to sentence Petitioner separately for the burglary and the grand theft. Thus, the only issue to be considered is whether the probation term for the grand

theft charge can overlap the parole for the separate offense of the burglary. Respondent would also maintain that there is no question that the probation ordered for the grand theft in the present case was to commence immediately upon release from prison pursuant to the probation order, condition number 17 (R 89).

To place this issue in its proper perspective, it will be necessary to examine the case of Villery v. Florida Parole and Probation Commission, 396 So.2d 1107 (Fla. 1981) and a line of cases from the Second District Court of Appeal that followed the decision in Villery.

The defendant in Villery was sentenced to five (5) years of probation with two and one-half (2-1/2) years of that probation to be served in the Department of Corrections. This sentence was pursuant to a finding of guilt on five (5) counts of writing or issuing worthless checks. A problem arose in Villery because the parole commission refused or could not exercise their authority pursuant to § 947.16(1), Fla. Stat. (1981) because the defendant was imprisoned as a condition of probation. This section mandated that a defendant must be considered for parole if the sentence was imprisonment and was for a period greater than twelve (12) months. An imprisonment term imposed by a judge pursuant to a condition of probation would effectively usurp the right of the parole commission to confer parole status pursuant to this legislative mandate. Although this Honorable Court also found other problems with such a practice, Respondent would submit that Villery addressed the problem of concurrent parole and probation for the same offense. As evidence by the following:

> We can only conclude that the legislature did not address these significant questions because it never contemplated the concurrent operation of parole and probation for the same offense.

396 So.2d at 1111 (emphasis supplied)

Although the defendant was actually sentenced to five (5) counts, the sentence of two and one-half years (2-1/2) years of imprisonment as a condition of five (5) years probation applied to each count. The Villery opinion examined this problem from the perspective of one separate offense, that is receiving either a split sentence or imprisonment as a condition of probation for just one offense. What Villery did not address was the problem of imposing probation after a term of imprisonment had been imposed for consecutive sentences.

The first case in the second district to examine this issue was Lewis v. State, 402 So.2d 42 (Fla. 2d DCA 1981). The Second District in Lewis examined and reviewed the ramifications of a so-called "split sentence". Again, Respondent would hasten to point out that the Lewis court was dealing with only one offense. The Second District critisized the holding of Villery to the extent that it vitiated "split sentences". The Second District maintained that if a prisoner was sentenced to five (5) years incarceration to be followed by five (5) years of probation, he could be paroled after one year in jail and remain on parole for four (4) more years. At that point, the probation term could commence. 402 So.2d at 484. This contention of the Second District, however, was mere dicta because the Second District adhered to the admonitions of the Villery decision and declined to uphold a "split sentence". The district court in Lewis did not make any distinction as to whether these "split sentences" would pertain to one offense or more.

Johnson v. State, 419 So.2d 753 (Fla. 2d DCA 1982) was the second case from the Second District Court of Appeal to visit this issue. The defendant in Johnson was initially sentenced to five (5) years of imprisonment, concurrent on two (2) offenses in February of 1975. In March of 1975, the defendant was sentenced to three (3) years probation (concurrent)

on felony prostitution related charges. This probation was to commence after the five (5) year imprisonment term imposed in February of 1975. The defendant was released on parole for the first set of offenses in January of 1978, that is two (2) years before his imprisonment sentence would expire. In April of 1981, the defendant was violated on his probation for the second set of offenses, that is the prostitution related offenses. The defendant appealed and argued that his probation term started on the parole release date and thus, as of April, 1981, he was no longer on probation. The Second District rejected this argument and maintained that the probation commenced upon the expiration of the initial parole and not upon release from prison. Significantly, the Johnson court did not discuss the distinction between one sentence (or concurrent sentences) and multiple offenses. Respondent submits that the evil corrected by the Villery decision was the overlapping of parole and judicial (via probation) functions for the same offense. For separate sentences the problem of judicial usurption of legislative power conferred to the parole commission pursuant to Chapter 947 Florida Statutes (1981) does not exist when each branch is exercising its authority pursuant to separate and distinct offenses. The Johnson decision erroneously and unnecessarily extends the Villery holding to multiple offense situations.

The third case in the Second District Court of Appeal's trilogy dealing with this issue is Thomas v. State, 434 So.2d 21 (Fla. 2d DCA 1983). Again the issue revolved around the problem of violating a probationer while he was on parole, but in Thomas the issue pertained to only one offense. Although the holdings stood for the proposition that a defendant could not be on probation and parole simultaneously, this holding was based upon the same offense and to the extent that the opinion relied on Villery it was correct.

To the extent that the district court in Thomas cited Johnnson, supra, as support, this reliance is misplaced. When a defendant is released from prison on parole, it is imperative to distinguish between probation and parole because the defendant would be subject to simultaneous violations (for both probation and parole) based upon just one offense. This consideration ceases to be a problem when dealing with two (2) separate sentences for two (2) separate offenses.

Caudillo v. State, 400 So.2d 123 (Fla. 4th DCA 1981) stood for the proposition that a defendant could be violated on his probation prior to the actual date of commencing. In Caudillo, the defendant was sentenced to two (2) years imprisonment followed by two (2) years on probation. Before the defendant was released from prison (i.e., paroled), he escaped. The Fourth District held that under these conditions the defendant's probation could be violated. In Martin v. State, 243 So.2d 189 (Fla. 4th DCA 1971), the Fourth District had the same holding as in Caudillo. In Martin, the defendant violated his probation pursuant to a split sentence. The probation violation stemmed from acts which were committed while the defendant was still in jail. Both Caudillo and Martin were based upon just once offense and one sentence. Both defendants were violated on their probation before the term of probation commenced and while they were still in jail or prison, respectively. Thus, this Honorable Court is presented with an anomalous situation where one's probation can be violated while he is incarcerated and yet cannot be while he is on parole according to the Johnson decision. Respondent would submit that probation supervision would be more imperative where one is released on parole as compared to such supervision of one who is in a completely controlled environment, that is he is incarcerated.

Following the holding in Johnson could result in a number of complications. Assuming, for purposes of a hypothetical, that this Honorable

Court would follow Johnson in that a defendant is imprisoned pursuant to one offense and then given a term of probation subsequent to that first offense or a new offense (whether the probation is ordered simultaneously with the imprisonment or shortly thereafter), a number of questions would have to be answered. If a trial court desires to give a subsequent probation sentence to a prisoner, must he withhold sentence until the parole term has expired? Under § 947.24, Fla. Stat. (1983), a parole period cannot exceed the maximum sentence. Under § 775.14, Fla. Stat. (1983), there is a limitation on withholding a sentence of five (5) years. Under certain circumstances, the parole commission could extend the prisoner's parole for a period of greater than five (5) years from the probation sentence date, thus effectively preclude the judge from imposing probation on a person for a second offense. Thus, in this hypothetical, the judge could be forced by the action of the parole commission to either not sentence a defendant at all or be relegated to imprisoning and fining the offender, even though probation might have been a more appropriate alternative. Even where there is no problem on the limitation of a withheld sentence, it would be inherently unfair to have the parole commission have the power to postpone a trial court's power to impose probation. Simply by being in the status of a parolee, a defendant will be immune from any potential conditions of probation. These circumstances would be grossly unfair where a judge would like to impose restitution to the victim and the defendant has the ability to pay. Under the Johnson decision, a defendant on parole can ignore such a restitution order. Although Villery addressed problem of judicial power impinging on the parole commission's authority, following the Johnson decision would result in the converse problem, that is the parole commission could potentially impinge on the judicial power.

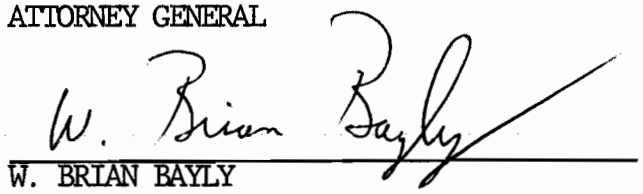
Although Stafford can be harmonized with Villery as well as the holding in Thomas based upon the distinction between single or multiple offenses, the holding in Stafford cannot be harmonized with the decision in Johnson. The Johnson opinion essentially misconstrues the ultimate holding in Villery and, in any event, the holding in Johnson is unworkable. Whether the Johnson holding stands or not, a trial court still has the discretion to impose probation subsequent to imprisonment and have that probation commence after a parole term expires by drawing his order accordingly.

## CONCLUSION

Based upon the foregoing cases, authorities, and polices, the Respondent respectfully requests that this Honorable Court uphold the decision of the District Court of Appeal, Fifth District, in the instant case and affirm the Petitioner's revocation of probation.

Respectfully submitted,

JIM SMITH
ATTORNEY GENERAL



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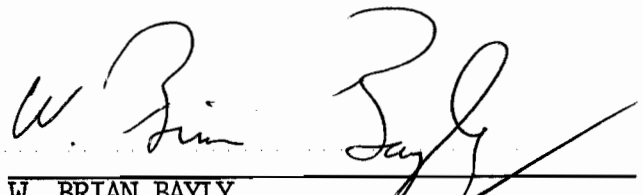
## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing Respondent's Brief on the Merits has been furnished, by delivery, to James R. Wulchak, Assistant Public Defender for Petitioner (1012 South Ridgewood Avenue, Daytona Beach, Florida 32014-6183), this 1st day of May, 1984.



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