

IN THE SUPREME COURT OF FLORIDA

VENDUL OLIVER STAFFORD,)
)
 Petitioner,)
)
 vs.)
)
 STATE OF FLORIDA,)
)
 Respondent.)
 _____)

CASE NO. 64,394

PETITIONER'S BRIEF ON JURISDICTION

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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STATEMENT OF THE CASE AND FACTS

On February 25, 1977, Stafford was charged with grand theft and burglary of a structure. He was convicted and adjudicated guilty. On May 31, 1977, he was sentenced to five (5) years on the burglary charge. On the grand theft charge, he was placed on probation to run consecutively with the sentence on the burglary charge. Stafford v. State, ___ So.2d ___, 8 FLW 2313 (Fla. 5th DCA Case No. 82-891, September 15, 1983). (Exhibits 1-3).

On January 15, 1982, an affidavit of violation of probation was filed alleging, among other charges, that Stafford had burglarized an Army/Navy store. Stafford pleaded no contest to this new charge. His probation stemming from the old grand theft conviction was revoked on the basis of the new charge over his objections that he was still on parole for the original burglary conviction and had not yet started his probationary period for the grand theft conviction. (Exhibit 1). The court rejected this claim in revoking his probation.

On appeal to the District Court of Appeal, Fifth District, the Defendant contended again that his probation could not be revoked since he had not yet commenced his probationary period. Stafford relied on this Court's holding in Villery v. Florida Parole and Probation Commission, 396 So.2d 1107 (Fla. 1981) to argue that a person cannot be on parole and probation at the same time, as probation and parole have separate

identities and must be treated separately. Stafford also relied on Johnson v. State, 419 So.2d 752 (Fla. 2d DCA 1982), which case held that a Defendant's term of probation did not commence until his parole expired (and not upon his release on parole from prison). Stafford v. State, supra. (Exhibit 1).

The District Court of Appeal, Fifth District, affirmed the probation revocation, rejecting the holding of Johnson, supra, and the recent decision of Thomas v. State, 434 So.2d 20 (Fla. 2d DCA 1983), (which specifically had reversed a Defendant's revocation of probation where, at the time of the offending conduct, the Defendant had not yet commenced his term of probation since he was still on parole). In so doing, the Fifth District chose instead to rely on cases from the Third and Fourth District Courts of Appeal, which cases stated as a general rule that a court's order placing a Defendant on probation could be revoked prior to the Defendant commencing that probationary period. Stafford v. State, supra. (Exhibit 1).

Because of this direct and express conflict between the Second District Court cases and the instant case (along with the Third and Fourth DCA cases), Stafford filed on October 14, 1983, a notice of intent to seek this Court's discretionary jurisdiction.

QUESTION PRESENTED

WHETHER THE DECISION OF THE DISTRICT COURT OF APPEAL, FIFTH DISTRICT, IN THE CASE SUB JUDICE IS IN DIRECT CONFLICT 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.

Jurisdiction for discretionary review vests where a District Court of Appeal announces a rule of law which directly conflicts with a previously announced rule of law. Nielson v. City of Sarasota, 117 So.2d 731 (Fla. 1960); Article V, Section 3(b)(3), Florida Constitution; Florida Rule of Appellate Procedure 9.030(a)(2)(A)(iv). In the instant case the Fifth District Court expressly held that a Defendant's probation can be revoked for a violation which occurred while the Defendant was on parole, prior to the commencement of the probationary period. Stafford v. State, ___ So.2d ___, 8 FLW 2313 (Fla. 5th DCA Case No. 82-891, September 15, 1983).

As the District Court even noted, this rule of law directly conflicts with the holdings of another District Court and this Court that a Defendant cannot be on parole and probation at the same time and that, therefore, a Defendant's probation could not be revoked where he was still on parole from a previous

sentence and had not yet commenced serving the consecutive probationary period. Thomas v. State, 434 So.2d 20 (Fla. 2d DCA 1983); Johnson v. State, 419 So.2d 752 (Fla. 2d DCA 1982); Villery v. Florida Parole and Probation Commission, 396 So.2d 1107 (Fla. 1981).^{1/}

Since a conflicting rule of law has been announced by the District Court in the case sub judice this Court has discretionary jurisdiction to review the case. The Petitioner therefore requests this Court to accept jurisdiction, to reverse the District Court's holding, and to remand with instructions to reinstate the Defendant's original probationary term.


^{1/} The Fifth District chose instead to follow a line of cases from the Third and Fourth District Courts, which cases are not precisely on point and do not deal with the issue herein presented, i.e., a revocation of probation where the person was, at the time, not yet on probation, but rather on parole (since a person cannot be both on parole and probation at the same time). See, e.g., Caudillo v. State, 400 So.2d 122 (Fla. 4th DCA 1981); Kimble v. State, 396 So.2d 815 (Fla. 4th DCA 1981); Williamson v. State, 388 So.2d 1345 (Fla. 3d DCA 1980); and Martin v. State, 243 So. 2d 189 (Fla. 4th DCA 1971), which cases do not deal with the distinction between a period of parole and a probationary term.

CONCLUSION

BASED UPON the foregoing, the Petitioner respectfully requests this Honorable Court to exercise its discretionary review herein.

Respectfully submitted,

JAMES B. GIBSON
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CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that a true and correct copy of the foregoing has been hand delivered to the Honorable Jim Smith, Attorney General, in his basket at the Fifth District Court of Appeal; and mailed to Vendul O. Stafford, Inmate No. B-057305, River Junction Correctional Institution, P.O. Box 37, Chattahoochee, Florida 32324, on this 24th day of October, 1983.



JAMES R. WULCHAK
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