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IN THE SUPREME COURT OF FLORIDA

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

CASE NO. 64,394

PETITIONER'S BRIEF ON THE MERITS

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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vs.) CASE NO. 64,394
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STATE OF FLORIDA,)
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PETITIONER'S BRIEF ON THE MERITS

STATEMENT OF THE CASE AND FACTS

On February 25, 1977, Stafford was charged with grand theft and burglary of a structure (R46). He was convicted and adjudicated guilty. On May 31, 1977, he was sentenced to five (5) years on the burglary charge (R85). On the grand theft charge, he was placed on probation to run consecutively with the sentence on the burglary charge (R88-90).

On January 15, 1982, an affidavit of violation of probation was filed alleging, among other charges, that Stafford had burglarized an Army/Navy store (R91). Stafford pleaded no contest to this new charge (R4,111-116). His probation stemming from the old grand theft conviction was revoked on the basis of the new charge over his objections that he was still on parole for the original burglary conviction and had not yet started his probationary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 (R4,100-101). The court rejected this claim in revoking his probation (R109).

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, 437 So.2d 232 (Fla. 5th DCA 1983).

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.

Notice of intent to seek discretionary review was filed on October 14, 1983. Following jurisdictional briefs, this Court accepted jurisdiction on March 22, 1984.

ARGUMENT

A DEFENDANT'S PROBATION IS
IMPROPERLY REVOKED WHERE,
AT THE TIME OF THE OFFENDING
CONDUCT, THE TERM OF PROBA-
TION HAD NOT YET COMMENCED
AND THE DEFENDANT WAS STILL
ON PAROLE FROM A PRIOR SEN-
TENCE.

Petitioner contends that he could not have violated his probationary agreement in that this probationary term was consecutive to a sentence and that at the time of the offending conduct, the petitioner was still on parole from the sentence which had been imposed. The petitioner submits that there is a clear difference between parole and probation and that the facts of this case demonstrate that the petitioner was in fact on parole and therefore could not have violated his probation.

As this Court pointed out in its decision in Villery v. Florida Parole and Probation Commission, 396 So.2d 1107, 1111 (Fla. 1981), the Florida Legislature never contemplated the concurrent operation of parole and probation and, in fact, its separate treatment of parole and probation under the applicable statutory scheme reflects a legislative intent to maintain their separate identity. This Court differentiated between a sentence and a probationary placement when it explained that once a sentence is imposed, a defendant falls within the jurisdiction of the Parole and Probation Commission under the authority granted to the commission pursuant to Section 947.16, Florida Statutes; however, if sentence is withheld and the defendant is placed on probation, he is generally committed to the supervision and control of the department of corrections. See §§ 948.04-.06, Fla.Stat. In this latter situation, the court which

placed the defendant on probation retains jurisdiction over the defendant for purposes of terminating, modifying, or revoking probation. Villery, supra, at 1110.

Since the petitioner was on parole for the sentence imposed in count two of the 1977 information, he could not have been at the same time on probation for the probationary placement which was designated as consecutive to the sentence imposed in count two of that information. Both the separate statutory treatment of parole and probation as well as the different jurisdictions applicable to both parole and probation bolster the petitioner's contention that a defendant cannot be on probation at the same time he is on parole. Villery, supra. As stated by this Court in In re Florida Rules of Criminal Procedure, 196 So.2d 124, 171 (Fla. 1967), "A probationary period is not a sentence and any procedure that tends to mix them is undesirable...." The district court's ruling sub judice does precisely this; it mixes the probationary period with the sentence or parole period, and is thus "undesirable".

While the district court of appeal chose to follow a line of cases from the third and fourth district courts, those cases did not deal with the distinction between a period of parole and a probationary term. They should not be followed in the instant situation of a probation revocation where the person was on parole at the time of the probation revocation, rather than on the probation itself; they deal instead with a different issue, i.e. revocations where the commencement of the probationary term had merely been delayed to a future date for some reason.

On the other hand, a case from the second district, dealing with the precise issue presented here, accepted the contention and

logic of the petitioner's argument in vacating a probation revocation order. Thomas v. State, 434 So.2d 20 (Fla. 2d DCA 1983).

There, the court relied upon the holding in Villery that a person cannot be on parole and probation at the same time. The Thomas court also relied on Johnson v. State, 419 So.2d 752 (Fla. 2d DCA 1982), where, in deciding that a term of probation did not begin until the term of parole expired, the court ruled that since probation and parole have separate identities and must be treated separately, a person cannot be on both probation and parole at the same time.

To follow the fifth district court's decision sub judice would create the same "legal and administrative morass" decried by this Court in Villery v. Florida Parole and Probation Commission, supra, at 1111.

For example, if a prisoner were released on parole for an offense for which he was still on probation, and the defendant were charged with a violation of his parole and probation, would the Parole and Probation Commission be required to stay any hearing for revocation of parole until the trial court decided whether to revoke probation? Could the same incident be used to revoke parole when it was not deemed serious enough to revoke probation? Which condition would control if the parole and probation conditions were inconsistent?

Id.

To follow the petitioner's argument and the Thomas case would not allow the defendant to go unpunished for his offensive conduct committed while on parole, as contended by the state and the fifth district, since not only could the defendant's parole be revoked, but he could be charged, tried, convicted, and sentenced separately for the new criminal conduct. 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.

The petitioner's probation should not have been revoked for conduct which occurred while on parole, prior to the probationary period. This Court should vacate the order of revocation.

CONCLUSION

BASED UPON the foregoing cases, authorities, and policies, the petitioner respectfully requests that this Honorable Court quash the decision of the District Court of Appeal, Fifth District, in the instant case, and remand with instructions to vacate the order revoking the petitioner's probation.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been mailed to: The Honorable Jim Smith, Attorney General, 125 N. Ridgewood Avenue, Fourth Floor, Daytona Beach, FL 32014 and Mr. Vendul O. Stafford, c/o Elizabeth Manior, 606 Cypress Avenue, Sanford, FL 32771 this 11th day of April, 1984.



JAMES R. WULCHAK
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