IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,
Petitioner,

v.

CATHERINE F. COCHRAN,
Respondent.

CASE NO: 65,064

RESPONDENT'S BRIEF ON MERITS

JERRY HILL
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

BY: Douglas S. Connor
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Tampa, Florida 33602

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CITATION OF AUTHORITIES

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STATEMENT OF THE CASE AND FACTS

Respondent accepts Petitioner's Statement of the Case and Facts as a substantially accurate account of the proceedings below with the following exceptions and additions pursuant to Fla.R. App. P. 9.210(c):

1. Respondent's motion in the trial court was a Motion for Correction of Illegal Sentence (Fla.R.Cr.P. 3.800) not a "Motion for Correction of a Legal Sentence" as stated by Petitioner (R 26).

2. Respondent's entry of plea was before the Honorable Arden Mays Merckle, who also ordered the consecutive periods of probation (R 44-48). A different trial judge, the Honorable Harry Lee Coe III, presided over the revocation proceedings (R 34-41).

3. Respondent also had probation revoked on the three cases for which she was serving concurrent seven year terms of probation. Four concurrent prison sentences of five, fifteen, five and fifteen years were imposed on these cases which were not appealed (R 40-41).

ARGUMENT

DOES THE TRIAL COURT HAVE THE POWER TO REVOKE CONSECUTIVE TERMS OF PROBATION? (as stated by Petitioner)

As Petitioner's brief points out, there is virtually unanimous agreement among the courts which have considered the issue that a trial court may revoke probation for acts committed between sentencing and the official commencement of the probationary term. See generally, Annot., 22 ALR 4th 755 (1983). Nonetheless, careful analysis of these authorities and comparison to the facts presented in the case at bar shows that the Second District correctly decided Cochran v. State, Case No. 83-1136 (Fla. 2d DCA March 21, 1984) [9 FLW 667] and its decision should be approved.

A.

FEDERAL DECISIONS AND DECISIONS IN OTHER STATE COURTS

Courts finding power to revoke a term of probation before its commencement have relied on differing justifications. One of these is statutory interpretation finding that once an order of probation has been issued, its conditions take effect even if the actual probationary term is not yet being served.

By example, the Federal Fifth Circuit decisions of United States v. Ross, 503 F.2d.940 (5th Cir. 1974) and United States v. Cartwright, 696 F.2d 344 (5th Cir. 1983) construed the federal probation statute, 18 U.S.C. §3653. This statute allows revocation of probation for violations occurring "during the probation period." The Ross court stated:

> Sound policy requires that courts should be allowed to revoke probation for a defendant's offense committed before the sentence commences; an immediate return to criminal activity is more reprehensible than one which occurs at a later date. 503 F.2d. at 943.

In accordance with this policy, the Ross Court held that the statutory language "during the probation period" encompassed the period between sentencing and the actual beginning of the probationary term. The Cartwright court followed the Ross opinion.

The facts behind the Ross and Cartwright decisions are however, significantly different from those in the case at bar. Ross was given one week after sentencing before he was to report to serve a period of incarceration which was a condition of his probation. During this week, he was arrested on new charges. Cartwright appealed his prison sentence with probation to follow and was released on an appeal bond with a provision that he not leave the jurisdiction. Cartwright ignored the provision and left the jurisdiction anyway.

Both of these federal decisions presented situations where the probationer's unlawful conduct might have gone unpunished had probation not been revoked. By contrast, the respondent in the case at bar had her probation revoked in three cases for which she was specifically serving her term of probation. She received punishment for violating the conditions of her probation. The only question presented here is whether the punishment can extend to revocation of a period of probation which was specifically ordered to be

consecutive to the orders of probation admittedly in force. Therefore, the public policy argument of Ross is not triggered by the facts at bar.

It should also be noted that the Eleventh Circuit recently declared that the trial court can revoke probation so long as the acts causing revocation occur within a probationer's period of probation. United States v. O'Quinn, 689 F.2d 1359 (11th Cir. 1982). The precise question presented at bar was not at issue in O'Quinn, however, the court's language indicates that if presented with that question, it might reach a different result than the Fifth Circuit decisions.

The state court decision which proceeded from the most analogous factual situation is Parrish v. Ault, 237 Ga. 401, 228 S.E.2d 808 (1976). There, the defendant was convicted on four counts. He received three years incarceration followed by two years probation on Count I. Three concurrent periods of probation were ordered on Counts II, III, and IV to be served consecutive to the sentence in Count I. Upon a violation during the probationary period designated in Count I, all the probations were revoked.

The same question was therefore squarely before the Ault court; namely whether a court may revoke probation which is to begin at a later date. The Georgia court held that probation could be revoked and cited two factors underlying its decision.

The first factor was the same trial judge who ordered the consecutive probations also revoked them. At bar, however, the judge who revoked probation was not the original sentencing judge.

The second factor was the operative statute involved. The Georgia statute read as follows:

> Said judge shall also be empowered to revoke said suspension or probation when the defendant has violated any of the rules and regulations prescribed by the court. 228 S.E.2d at 809.

Since this statute is silent about whether the conduct supporting revocation must occur during the term probation is being served, the Ault court decided the trial judge had power to revoke the consecutive periods of probation.

By contrast, the Florida Statute applicable is Section 948.06(1), Florida Statutes (1983) which provides in pertinent part:

> Whenever within the period of probation... there is reasonable ground to believe that a probationer...has violated his probation... (emphasis supplied)

Clearly the Florida statute differs from the Georgia statute in that it specifically contemplates that the improper conduct must occur "within" the probationary term. It is likely that the Ault court would have reached a different result given the facts at bar and the contrasting statutory authority.

B.

FLORIDA DECISIONS

The Florida decisions which have upheld revocation for acts occurring before the term of probation have not relied upon stretching the scope of the statute. Rather, the basis has been a finding of "inherent power" in the trial court to revoke probation. As stated by the Fourth District in Martin v. State, 243 So.2d 189 at 190-91 (Fla. 4th DCA 1971):

> The question here is whether a defendant probationer can, with impunity, engage in a criminal course of conduct (or for that matter any course of conduct which is essentially contrary to good behavior) during the interval between the date of an order of probation and some subsequent date when the probationary term is to commence. We think not. To hold otherwise would make a mockery of the very philosophy underlying the concept of probation, namely, that given a second chance to live within the rules of society and the law of the land, one will prove that he will thereafter do so and become a useful member of society. Although the statute empowers the court to revoke probation when a probationer has violated a condition of his probation in a material respect, the power to revoke probation is an inherent power of the trial court, which may be exercised at anytime upon the court determining that the probationer has violated the law. Under the exercise of such inherent power, the court can revoke an order of probation, the term of which has not yet commenced.
>
> (citations omitted.)

This language has been quoted with approval in the other district court cases certified to be in direct conflict with the decision at bar, Williamson v. State, 388 So.2d 1345 (Fla. 3d DCA 1980) and State v. Stafford, 437 So.2d 232 (Fla. 5th DCA 1983), rev. granted, Supreme Ct. Case No. 63,394.

Respondent respectfully submits that the "inherent power" of a trial court to affect a probationer's liberty is not as broad as the Martin decision would indicate. As the First District said in Holmes v. State, 342 So.2d 134 at 135 (Fla. 1st DCA 1977):

> The courts have no authority to provide a penalty where no punishment is provided by the legislature. The judiciary can only impose penalties within the limit set by the legislature.
>
> (Citations omitted),

In fact, the true rationale of the Martin, Williamson and Stafford decisions is a strong public policy which dictates that a probationer should not escape the consequences of a probation violation merely because the term of probation is not yet in force. The facts of Martin show that the defendant was in jail as a condition of probation when he committed criminal acts. Since he was incarcerated, he was not yet within the probationary period. In Williamson, the defendant failed to surrender himself to serve the jail term which was a condition of his probation. The probationary period would not commence until he had completed the one year county jail term. Stafford involved misdeeds by a defendant who was on parole prior to the commencement of his probationary term.

As pointed out previously, this policy is not implicated in the case at bar because Respondent did not escape punishment. Probation was revoked on the cases for which she was currently serving a term of probation. The true policy which is implicated in the case at bar is the power of the sentencing judge to design a sentence which will effectively balance the interests of the public in protection from crime against the granting of an opportunity for reform to the prisoner. The sentencing judge specifically decided that Respondent's term of probation should be served consecutive to the terms of probation ordered on the other charges. To revoke the term expressly made consecutive before it had commenced was, in effect, treating this probationary period as concurrent rather than consecutive.

It cannot be said that the trial judge was merely changing his mind. A different judge presided over the revocation and he apparently gave no consideration to the sentencing design of the original judge who made the probations consecutive.

It should also be noted that if the courts are going to treat all periods of probation as concurrently in effect, regardless of whether they are designated concurrent or consecutive, an illegal sentence results when the total length of the consecutive probations exceeds the statutory maximum for the offense made consecutive. For example, where two third-degree felonies were involved, consecutive terms of three years probation each would be illegal if the State's argument prevails. See Watts v. State, 328 So.2d 223 (Fla. 2d DCA 1976); Holmes v. State, 360 So.2d 380 (Fla. 1978).

Because neither policy nor logic supports revocation of a probationary term expressly designated consecutive prior to its commencement, the decision of the Second District below should be affirmed and the decisions in conflict disapproved insofar that they are contrary.

CONCLUSION

Based upon the foregoing argument, reasoning and authorities, Respondent, Catherine F. Cochran, respectfully requests this Court to affirm the decision of the Second District Court of Appeal in her cause.

Respectfully submitted,

JERRY HILL
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by mail to the Office of the Attorney General, Park Trammell Building, 1313 Tampa Street, 8th Floor, Tampa, Florida and to the Respondent, Catherine F. Cochran, # 486547, P.O. Box 8540, Pembroke Pines, Florida 33024, this 10th day of May, 1984.

Douglas S. Connor
Douglas S. Connor