

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,  
Petitioner,

v.

Case No. 65,064

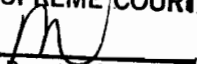
CATHERINE F. COCHRAN,  
Respondent.

**FILED**

SID J. WHITE

APR 23 1984

CLERK, SUPREME COURT

By   
Chief Deputy Clerk

PETITIONER'S BRIEF ON MERITS

JIM SMITH  
ATTORNEY GENERAL

GARY O. WELCH  
Assistant Attorney General  
1313 Tampa Street, Suite 804  
Park Trammell Building  
Tampa, Florida 33602  
(813) 272-2670

COUNSEL FOR PETITIONER

TABLE OF CONTENTS

	<u>PAGE</u>
STATEMENT OF THE CASE AND FACTS	1
ARGUMENT	4
DOES THE TRIAL COURT HAVE THE POEWER TO REVOKE CONSECUTIVE TERMS OF PROBATION?	
CONCLUSION	9
CERTIFICATE OF SERVICE	9

TABLE OF CITATIONS

	<u>PAGE</u>
Cochran v. State, 9 F.L.W. 677 (opinion filed March 2, 1984)	9
Commonwealth v. Vivian, 231 A. 2d 301 (Penn. 1967)	8
Commonwealth v. Wendowski, 428 A. 2d 628 (Penn. 1980)	7,8
Gant v. State, 654 P. 2d 1325 (Alaska 1982)	7
Martin v. State, 243 So.2d 189 (Fla. 4th DCA 1971)	3,5
Parrish v. Ault, 228 S.E. 2d 808 (Ga. 1976)	8
Roberts v. State, 252 S.E. 2d 209 (Ga. app. 1979)	7
Sole v. Rundle, 435 F.2d 721 (3rd Cir. 1971)	5
State v. Carlo, 409 A.2d 1216 (R.I. 1980)	7
State v. DeAngelis, 183 S.E. 2d 906 (S.C. 1971)	7
State v. Jones, 327 So.2d 18 at 25 (Fla. 1976)	8
State v. Morris, 563 P.2d 52 (Idaho 1977)	7
State v. Stafford, 437 So.2d 232 (Fla. 5th DCA 1983)	6
State v. Sullivan, 642 P. 2d 52 (Idaho 1977)	7
Thomas v. State, 434 So.2d 20 (Fla. 2d DCA 1983)	5,6,9
U.S. v. Cartwright, 696 F.2d 344 (5th Cir. 1983)	6
U.S. v. Jergens, 626 F.2d 142 (9th Cir. 1980)	4
U.S. v. Ross, 503 F.2d 940 (5th Cir. 1975)	4,5
U.S. v. Tucker, 525 F.2d F.2d 27 (5th Cir. 1975)	4
<u>Villery v. Florida Parole and Probation Commission, 396 So.2d</u> <u>1107 (Fla. 1981)</u>	5
Williamson v. State, 388 So.2d 1345 (Fla. 3d DCA 1980)	3,6
Wright v. U.S., 315 A.2d 839 (D.C. 1974)	5,6

OTHER AUTHORITIES

PAGE

FLORIDA STATUTES

947.16

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948.06(1)

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949.06(1)

5

18 U.S.C.

3653

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STATEMENT OF THE CASE AND FACTS

Respondent was charged by a two (2) count information with burglary and robbery with firearm on May 17, 1982. (R 4) The case number assigned to these charges was Circuit Court Case Number 82-4493. Pursuant to plea negotiations, the Respondent pled guilty to the two (2) charges in Case No. 82-4493 and others on August 11, 1982. (R 44 - 48) Respondent was adjudged guilty and placed on probation for three (3) years on Case Number 82-4493. The Order adjudging guilt and placing the Respondent on probation reveals that the three (3) year probation that she received on the two (2) charges in Case No. 82-4493 were to be served concurrently but consecutive to a seven (7) period of probation ordered on other charges. (R 8) As a special condition of her probation, the Respondent was to testify against her co-defendant. (R 48)

On March 2, 1983, an affidavit charged the Respondent with violating her conditions of probation. This affidavit alleged that the Respondent absconded from the DACCO Residential Center, used cocaine and possessed a syringe containing Dialaudid. (R 10) An amended affidavit was filed on April 4, 1983 alleging the three (3) previous allegations and also that the Respondent violated her probation by failing to remain at liberty without violating any law. (R 14-16)

A probation revocation hearing was held on April 14, 1983, at which the Respondent pled guilty to violating her probation by absconding from the DACCO Residential Center and by possessing a syringe containing Dialaudid. (R 35-36) At the probation revocation

hearing, a dispute arose as to whether the Respondent had pled to the offense of robbery or armed robbery. (R 36-37) During this dispute, the Court asked the Clerk whether the Respondent had pled to robbery with a firearm or a deadly weapon or just simple robbery. The Clerk responded that the Respondent had pled guilty to the robbery with a firearm or a deadly weapon. (R 37) Thereafter, the court sentenced the Respondent to concurrent terms of ninety-nine (99) years and fifteen (15) years in the Florida State prison on Case Number 82-4493. (R 41)

A Motion for Correction of a Legal Sentence was filed by the Respondent in the trial court on May 10, 1983. In his Motion for Correction of a Legal Sentence, the Respondent alleged as one of his grounds that the trial court lacked jurisdiction to revoke the Respondent's probation in Circuit Case Number 82-4493 because the probation period had not yet commenced, and therefore, the court lacked jurisdiction to revoke it. (R 26) Additionally, the Respondent also contested that trial court's retention of jurisdiction over one half of the sentence on the grounds that the trial court's retention of jurisdiction pursuant to §947.16, Florida Statutes, was ex post facto as applied to the Respondent. (R 26)

The Respondent filed her Notice of Appeal on May 13, 1983, before the trial court ruled on her Motion for Correction of an illegal sentence. (R 28) In an opinion filed March 21, 1984, the Second District Court of Appeals reversed and remanded the trial court's order revoking probation in Case Number 82-4493 on the grounds that the Respondent's probation in that case had not

begun at the time of the conduct found to constitute a violation of probation. The Second District Court of Appeal stated that to hold otherwise would allow consecutive terms of probation to be given a concurrent effect. The Second District Court of Appeal certified that its decision was in direct conflict with the decisions of their sister courts in State v. Stafford, 437 So.2d 232 (Fla. 5th DCA 1983), Williamson v. State, 388 So.2d 1345 (Fla. 3d DCA 1980), and Martin v. State, 243 So.2d 189 (Fla. 4th DCA 1971). Thereafter, Petitioner filed a Notice to Invoke Discretionary Jurisdiction of this Court.

## ARGUMENT

### DOES THE TRIAL COURT HAVE THE POWER TO REVOKE CONSECUTIVE TERMS OF PROBATION?

Section 948.06(1), Florida Statutes (1983), provides that "whenever within the period of probation" there is reasonable ground to believe that a probationer has violated his probation any parole or probation supervisor may arrest such probationer. The federal probation statute authorizes the arrest of a probationer for violations occurring "during the probation period." 18 U.S.C. §3653. The federal courts have held that the federal statute authorizes revocation for acts committed after the imposition of sentence but prior to the effective date of the probation term. U.S. v. Tucker, 525 F.2d 77 (5th Cir. 1975), and U.S. v. Ross, 503 F.2d 940 (5th Cir. 1975). Furthermore, the federal courts have jurisdiction to revoke probation for crimes committed by a probationer before he was placed on probation, where the evidence of these crimes was unknown to the court at the time probation was granted. U.S. v. Jergens, 626 F.2d 142 (9th Cir. 1980). The Third Circuit has held that a state court may revoke a defendant's suspended sentence and probation and then impose a prison sentence more than two years after expiration of the probation term for an offense committed before the probationary sentence without violating the double jeopardy clause of the Fifth Amendment where the defendant had misrepresented facts concerning the offense at the time of imposition of the probationary sentence. Sole v. Rundle,



435 F.2d 721 (3rd Cir. 1971). Accordingly, Petitioner submits that the Section 949.06(1) Florida Statutes (1983), is not by its term exclusive and that sound judicial policy requires that a trial court have the power to revoke probation when the defendant commits an offense after sentencing, but before the actual service of the sentence of probation has begun. Ross at 943.

In reversing the trial court's revocation of consecutive terms of probation in the case sub judice, the Second District Court of Appeal relied solely on Thomas v. State, 434 So.2d 20 (Fla. 2d DCA 1983). In Thomas the court stated that a person could not be on parole and probation at the same time, and since the defendant was on parole his probationary period had not commenced, it was improper to revoke his probation. In reaching its conclusion that a person cannot be on parole and probation at the same time the Second District in Thomas relied on Villery v. Florida Parole and Probation Commission, 396 So.2d 1107 (Fla. 1981). In Villery this court stated that parole and probation were separate statutory creations and that they should be treated separately. Villery at 1111. However, Villery does not stand for the proposition that probation cannot be violated while on parole.

In Martin v. State, 243 So.2d 189 (Fla. 4th DCA 1971), the Fourth District held that it was within the trial court's inherent power to revoke probation for misconduct which had occurred while the defendant was in jail and prior to the commencement of his probationary term. Martin was cited for support in Wright v. U.S., 315 A 2d 839 (D.C. 1974), where the court held that "probationary

term" included the interval between the grant of probation and the time the defendant began actual service of probation. The court in Wright was confronted with analogous facts and rejected the results provided by the Second District in Thomas and stated such a construction would lead to the absurd result of ignoring a defendant's criminal conduct during the interval between the grant of probation and the commencement of the actual probation. Furthermore, the Fourth District Court of Appeals's decision was followed by the Third District in Williamson v. State, 388 So.2d 1345 (3rd DCA 1980). See also U.S. v. Cartwright, 696 F.2d 344 (5th Cir. 1983).

Thomas v. State, supra, has also been rejected by the Fifth District Court of Appeal in State v. Stafford, 437 So.2d 232 (Fla. 5th DCA 1983). In Stafford, the court held that the trial court could revoke the defendant's probation while on parole for acts committed while on parole. The Stafford opinion is consistent with the overwhelming majority of the other states when they were confronted with the identical issue.<sup>1/</sup> Roberts v. State, 252 S.E. 2d

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<sup>1/</sup> Although the different states have evaluated the issue from different postures, the cases cited by the Petitioner reveals that eight states, the District of Columbia, and three Federal Circuits have decided that their trial courts have the power to revoke probation for acts committed after sentencing, but prior to the commencement of the probation term. Whereas, only South Carolina recognizes the stance taken by the Second District in the case sub judice.

209 (Ga. App. 1979); State v. Sullivan, 642 P. 2d 1008 (Mont. 1982), Gant v. State, 654 P. 2d 1325 (Alaska 1982), State v. Morris, 563 P. 2d 52 (Idaho 1977), Commonwealth v. Wendowski, 428 A. 2d 628 (Penn. 1980) and State v. Ciarlo, 409 A. 2d 1216 (R.I. 1980).

However, the court in State v. DeAngelis, 183 S.E. 2d 906 (S.C. 1971), held that, where the defendant was sentenced to a term of twenty years, provided that upon service of three years, the balance of the sentence would be suspended and the defendant placed on probation for five years, and the defendant was allowed 120 days within which to arrange his business affairs before commencing service to the three year prison term, the court was without authority to revoke the defendant's probation on the basis of another crime committed during the 120 days allowed him to arrange his business affairs because the order placing the defendant on probation was ambiguous as to whether the defendant was subject to the conditions of probation during 120 day period prior to the commencement of the sentence. Assuming for arguments sake that DeAngelis is authoritative, despite the overwhelming authority to the contrary; DeAngelis would not be applicable to the case sub judice because the Respondent was sentenced to the consecutive terms of probation that had the same conditions of probation in the same order. Therefore, the Respondent knew that her probation was subject to revocation.

The Second District, in the case sub judice, also stated that it would be improper to allow the trial court to revoke consecutive terms of probation because it would allow consecutive terms of probation to be given concurrent effect. The Georgia Supreme Court

in Parrish v. Ault, 228 S.E. 2d 808 (Ga. 1976), stated that it was proper to revoke consecutive terms of probation and held that the authority of the trial court was not limited to the probation term being served by the defendant at the time the revocation order was issued. Furthermore, the court in Commonwealth v. Wendowski, supra, found support in Commonwealth v. Vivian, 231 A. 2d 301 (Penn. 1967), a case that upheld a revocation of five concurrent terms of probation against double jeopardy claims.

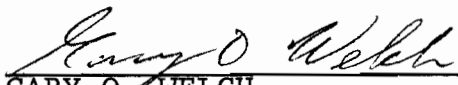
This court has stated that a trial court "may revoke, revise, or modify for cause the probation and incarceration provision at any time during the period that said order is in force and may impose any sentence which might have originally been imposed." State v. Jones, 327 So.2d 18 at 25 (Fla. 1976). Whereas the Respondent was on probation pursuant to the same order which gave her a consecutive three (3) year probationary period for Circuit Court Case No. 82-4493, she was within the trial courts jurisdiction because the order was in force at the time of the offending conduct.

CONCLUSION

Whereas the trial court has inherent power to revoke a criminal defendant's probation prior to actual commencement of that particular probationary term and because public policy requires that a probationer be held responsible for his criminal conduct after the imposition of sentence but prior to the commencement of the probation term should reverse, the Second District's opinions in the case sub judice, Cochran v. State, 9 F.L.W. 677 (opinion filed March 2, 1984), and its parent case; Thomas v. State, 434 So.2d 20 (Fla. 2d DCA 1983).

Respectfully submitted,

JIM SMITH  
ATTORNEY GENERAL

  
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GARY O. WELCH  
Assistant Attorney General  
1313 Tampa Street, Suite 804  
Park Trammell Building  
Tampa, Florida 33602  
(813) 272-2670

COUNSEL FOR PETITIONER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by U.S. Mail to Douglas S. Connor, Assistant Public Defender, Courthouse Annex, Second Floor, Tampa, FL 33602, on this 18th day of April, 1984.

  
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OF COUNSEL FOR PETITIONER