IN THE SUPREME COURT OF FLORIDA

CURTIS SMITH,

Petitioner,

v.

CASE NO. 65,119

STATE OF FLORIDA,

Respondent.

ON DISCRETIONARY REVIEW FROM THE
FIRST DISTRICT COURT OF APPEAL

BRIEF OF PETITIONER ON THE MERITS

MICHAEL E. ALLEN
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

P. DOUGLAS BRINKMEYER
ASSISTANT PUBLIC DEFENDER
POST OFFICE BOX 671
TALLAHASSEE, FLORIDA 32302
(904) 488-2458

ATTORNEY FOR PETITIONER

TABLE OF CONTENTS

TABLE OF CITATIONS

IN THE SUPREME COURT OF FLORIDA

CURTIS SMITH, :

Petitioner, :

v. : CASE NO. 65,119

STATE OF FLORIDA, :

Respondent. :

:

BRIEF OF PETITIONER ON THE MERITS

I PRELIMINARY STATEMENT

Petitioner was the petitioner and appellant in the lower tribunal, but the parties will be referred to as they appear before this Court. Attached hereto is an appendix, which contains the opinion of the First District filed March 19, 1984.

II STATEMENT OF THE CASE AND FACTS

The history of this case is accurately stated in the opinion of the First District:

> Appellant was convicted by a jury of the second degree misdemeanor of trespass in a structure. At the subsequent sentencing proceeding, the court adjudged appellant guilty and placed him on six months' [sic] probation. As a condition of probation, the court required that appellant spend sixty days in the county jail, and, upon release, serve eight weekends of alternative community service. Appellant then filed the motion to correct sentence herein appealed, which was denied. Subsequent to his appeal of the order, but prior to filing the petition for habeas corpus, appellant completed the 60 days jail time condition of his probation. Appellant points out that §775.082(4)(b), Florida Statutes (1983), sets the maximum sentence for a second degree misdemeanor at 60 days. He contends that, since he has been required to remain on probation and that the order requiring him to do so, including community service requirements, should be reversed. We cannot agree.

Appendix at 2. The First District certified that its decision was in direct conflict with one from the Second District:

> We certify, pursuant to Art. V, §3(b)(4), Florida Constitution (1983), that this decision is in direct conflict with that of the Second District Court of Appeal in Winkle v. State, 422 So.2d 984 (Fla. 2d DCA 1982). That case involved a factual situation identical to the one herein. Appellant had received a six-month period of probation, and, as a condition thereof, was required to serve 60 days in jail, the maximum sentence allowable for his crime. The court found controlling the decision in State v. Holmes, 360 So.2d 380 (Fla. 1978), which held that, when a defendant is sentenced to a period of incarceration followed by a period of probation (split sentence), "the combined periods at the

> time of the original sentence cannot exceed the maximum period of incarceration provided by statute for the offense charged." Id. at 383. The Winkle court found Holmes equally applicable to the situation before it and held that, "the combined periods of incarceration and probation imposed as a split sentence probation alternative must be within the maximum term of imprisonment provided by the statute for the crime involved." Winkle, at 985. We do not find Holmes controlling, in view of the fact that the court therein addressed a sentence of a term of incarceration as a condition of probation. We therefore do not follow the Winkle decision, and affirm the probation order herein appealed.

Appendix at 4-5.

Notice of discretionary review was timely filed in the lower tribunal.

III ARGUMENT

ISSUE PRESENTED

THE DECISION OF THE FIRST DISTRICT IN THE INSTANT CASE IS INCORRECT IN LIGHT OF THIS COURT'S DECISIONS IN STATE V. HOLMES, 360 So.2d 380 (Fla. 1978) AND VILLERY V. FLORIDA PAROLE AND PROBATION COMMISSION, 396 So.2d 1107 (Fla. 1980).

The First District in the instant case held that in imposing the maximum permissible sentence of 60 days as a condition of six months probation is not illegal, citing Villery, supra. While Villery held that a one year term of incarceration as a split sentence or as a condition of probation is illegal, this Court also observed:

> However, while a probationer's taste of prison is intended to be unpalatable, it must not be served as the main course. Imposing a long prison term is, as everted to by the district court in Olcott [378 So.2d 303 (Fla. 2d DCA 1979)], contrary to the spirit of probation. If a long prison term serves no rehabilitative goal, then it ceases to be an incident of probation. Indeed, far from serving the ostensible goal of rehabilitation, an extended probation jail term will instead prove more punitive to defendant than will a sentence of imprisonment where the the express objective is to punish the defendant.

Id. at 1110-1111. Here, petitioner's 60 day county jail sentence as a condition of six months probation, being a full one-third of the total term, is punitive as opposed to rehabilitative. It is the same as if he had been convicted of a second degree felony, rather than a second degree misdemeanor, and placed on probation for 15 years on condition that he serve five years in prison.

This view was recognized by the Second District in Winkle v. State, supra. There, just like petitioner, the defendant was convicted of a second degree misdemeanor and placed on six months probation with a condition that he serve 60 days in jail. The Second District held:

> The court stressed in Villery that incarceration as a condition of probation serves as a incident of probation to give the defendant "a taste of prison"; it must not serve as the "main course." Id. at 1110-11. A maximum term of incarceration as a condition of probation can hardly be characterized as an incident of probation.
>
> We therefore hold that the combined periods of incarceration and probation imposed as a split sentence probation alternative must be within the maximum term of imprisonment provided by statute for the crime involved. Thus, the trial court in this case lacked the authority to impose as a condition of probation the maximum jail term for the petit theft conviction.

Id. at 985. Moreover, the court in Winkle found support for its decision in this Court's opinion in State v. Holmes, supra. In Holmes, this Court held that a total split sentence, which combined incarceration followed by a period of probation, cannot exceed the statutory maximum for the crime. Winkle properly extended this view to incarceration as a condition of probation, since this Court did likewise on rehearing in Villery: "This applies to incarceration as a condition of probation as well as to incarceration followed by a specified period of probation." 396 So.2d at 1111. The First District in the instant case, in finding Winkle's

interpretation of Holmes persuasive, ignored the importance of Villery quoted above that there is no difference between the two alternative dispositions when examining an excessive sentence. Thus, the First District's decision is contrary to the combined holdings of Holmes and Villery. This Court must reverse the decision of the First District and hold that a 60 day period of incarceration as a condition of six months probation is illegal.

IV CONCLUSION

Based upon the foregoing argument, reasoning, and citation of authority, petitioner requests that the decision of the First District be reversed, and that this Court hold the probation to be illegal.

Respectfully submitted,

MICHAEL E. ALLEN
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

P. Douglas Brinkmeyer

P. DOUGLAS BRINKMEYER
Assistant Public Defender
Post Office Box 671
Tallahassee, Florida 32302
(904) 488-2458

Attorney for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by hand to Assistant Attorney General John Tiedemann, The Capitol, Tallahassee, Florida; and by mail to Mr. Curtis Smith, 926 Coble Drive, Tallahassee, Florida, 32301, this 13 day of April, 1984.

P. Douglas Brinkmeyer

P. DOUGLAS BRINKMEYER
Assistant Public Defender