IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v. CASE NO. 65,754

COYE ELLIOTT BOYETT,

Respondent.

PETITIONER'S BRIEF ON THE MERITS

JIM SMITH
ATTORNEY GENERAL

KARLA J. STAKER
Assistant Attorney General
1313 Tampa Street, Suite 804
Park Trammell Building
Tampa, Florida 33602
(813) 272-2670

OF COUNSEL FOR PETITIONER

/tms

TABLE OF CONTENTS

TABLE OF CITATIONS

OTHER AUTHORITIES CITED

STATEMENT OF THE CASE AND FACTS

On May 10, 1982, an information was filed in the Circuit Court for Highlands County charging Respondent, Coye Elliott Boyett, with unlawful possession on April 17, 1982, of a short-barreled shotgun.[1] (R 40 - 43) A jury found Respondent guilty as charged. (R 44)

On September 29, 1982, the trial judge adjudicated Respondent guilty and placed him on five years' probation with the condition that he serve 360 days in Florida State Prison with credit for time served. (R 45 - 46) In June, 1983, Respondent completed his conditional prison term. (R 28)

On August 8, 1983, an affidavit of violation of probation was filed. (R 47) It alleged that on July 22 and July 30, 1983, Respondent defrauded an innkeeper, committed retail theft and consumed alcoholic beverages. (R 47)

At Respondent's hearing on October 27, 1983, he admitted the probation violations and opted to be sentenced under the sentencing guidelines. (R 22 - 24) Although the recommended sentence under the guidelines was "any nonstate prison sanction," the judge imposed a three year prison term. (R 12) As reasons for departure from the guidelines, the judge noted that Respondent had been on probation before for aggravated battery; had a drinking problem and was a threat to society; and had already served one year in prison as a condition of the probation he violated. (R 12)

The District Court of Appeal for the Second District affirmed

---

[1] §790.221, Florida Statutes (1981).

the sentence. Boyett v. State, No. 83-2352 (Fla. 2 DCA July 11, 1984). It held that (1) Respondent could elect guidelines sentencing upon revocation of his probation even though he was placed on probation before the effective date of the guidelines; (2) clear and convincing reasons justified departure from the guidelines sentence; and (3) although the trial judge improperly imposed a public defender lien as a condition of parole, the error was moot since Respondent was ineligible for parole. Judge Campbell dissented on point (1), and the court certified the question as one of great public importance.

ISSUE I

IS A DEFENDANT WHO WAS PLACED ON PROBATION BEFORE OCTOBER 1, 1983, ENTITLED TO ELECT TO BE SENTENCED UNDER THE SENTENCING GUIDELINES AFTER OCTOBER 1, 1983, UPON A REVOCATION OF HIS PROBATION?

Section 921.001(4)(a), Florida Statutes (1983), in pertinent part provides:

> "The guidelines shall be applied . . . to all felonies, except capital felonies and life felonies, committed prior to October 1, 1983, for which sentencing occurs after such date and when the defendant affirmatively selects to be sentenced pursuant to the provisions of this act."
>
> (emphasis added)

Accord, In Re Rules of Criminal Procedure (Sentencing Guidelines), 439 So.2d 848, 849 (Fla. 1983). This statute simply means that if the crime occurred before October 1, 1983, but initial sentencing occurs after that date, the defendant can elect guidelines sentencing. It does not purport to govern a resentencing occurring after the effective date of the guidelines. Since placing a defendant on probation constitutes "sentencing" within the meaning of the guidelines, imposition of sanctions upon revocation of probation constitutes a resentencing.

Petitioner does not contend that probation is always included within the term "sentence". In some contexts it is not. For example, section 948.01(3), Florida Stautes (1983), within the chapter entitled "Probation and Community Control," refers to probation as a sanction distinct from a "sentence." Distinguishing probation from sentences of imprisonment is to be expected in the chapter addressing probation. Also, this Court has held that incarceration as a

condition of probation is not a "sentence" for purposes of eligibility for parole. Villery v. Florida Parole and Probation Commission, 396 So.2d 1107 (Fla. 1981).

On the other hand, in death penalty cases incarceration as a condition of probation actually constitutes a "sentence of imprisonment" within the meaning of the aggravating circumstance set forth in section 921.141(5)(a), Florida Statutes (1977). Peek v. State, 395 So.2d 492 (Fla. 1981), cert. denied, 451 U.S. 964, 101 S.Ct. 2036, 68 L.Ed.2d 342 (1981). Also, probation constitutes a "sentence" within the meaning of the rule barring imposition of a general sentence for two offenses. Cervantes v. State, 442 So.2d 176 (Fla. 1983). Further, the term "sentence" is defined in Florida Rule of Criminal Procedure 3.700(a) as "the pronouncement by the Court of the penalty imposed upon a defendant for the offense of which he has been adjudged guilty." That definition is broad enough to include probation.

The framers of the sentencing guidelines used the term "sentencing" broadly. They undoubtedly meant for it to encompass imposition of "any nonstate prison sanction." Throughout, they speak of "sentencing" without distinguishing it from imposition of probation. Significantly, when they want to refer to sentences of imprisonment, they use the term "incarcerative sanctions." See Florida Rule of Criminal Procedure 3.701(b)(7).

Even more significantly, if imposition of probation does not constitute "sentencing" under the guidelines the application of section 921.001(4)(a) would be severely limited. A defendant qualifying for "any nonstate prison sanction" would be unable to receive

probation for crimes occurring before October 1, 1983. That is, although he would be entitled to elect "sentencing" he would not be entitled to elect probation.

Since section 921.001(4)(a) does not apply to the resentencing of pre-guidelines probationers, the provisions of section 948.06(1) remain intact. That section specifically provides that when probation is revoked, the court may "impose any sentence which it might have originally imposed before placing the probationer on probation."

In Cervantes v. State, this Court refused the invitation to engage in an esoteric discussion whether probation is a sentence. The Court may similarly be reluctant to engage in debate as to whether sentencing upon revocation of probation constitutes a resentencing to which §921.001(4)(a) does not apply. If so, it should nonetheless deny guidelines sentencing for pre-guidelines probationers based on policy considerations.

Guidelines sentences are generally shorter than conventional sentences. Spitzmiller, An Examination of Issues in Florida Sentencing Guidelines, 8 Nova L.J. 687, 689 (1984). It would be unreasonable for a defendant to receive a more lenient sentence after revocation of probation than he would have received had he never been placed on probation. More importantly, the trial judge should not have less discretion upon revocation of probation than he had when he placed the defendant on probation. See Boyett v. State, No. 83-2352 (Fla. 2 DCA July 11, 1984) (Campbell, J., Concurring in part, Dissenting in part).

CONCLUSION

For the reasons presented, Petitioner asks this Honorable Court to answer the certified question in the negative.

Respectfully submitted,

JIM SMITH
ATTORNEY GENERAL

Karla J. Staker

KARLA J. STAKER
Assistant Attorney General
1313 Tampa Street, Suite 804
Park Trammell Building
Tampa, Florida 33602
(813) 272-2670

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to Michael E. Raiden, Assistant Public Defender, 455 North Broadway, Bartow, Florida 33830, this 4th day of September, 1984.

Karla J. Staker
OF COUNSEL FOR PETITIONER.