IN THE SUPREME COURT OF FLORIDA

FRED LORENZO BROOKS,)

Petitioner,)

vs.) CASE NO.: 66,417

STATE OF FLORIDA,)

Respondent.)

RESPONDENT'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

The State accepts the Preliminary Statement as set forth in the Petitioner's brief and will use the designations stated therein. The initial brief will be referred to by the symbol "IB".

This case involves the issue raised in Clem v. State, No. 81-2243 (Fla. 4th DCA, August 31, 1983) [9 FLW 2135] vacated on rehearing (August 29, 1984) [9 FLW 1868] as to whether the trial court has jurisdiction to revoke community control status when a defendant is sentenced as a youthful offender. The Florida Parole and Probation Commission appeared as amicus curiae in Clem v. State.

STATEMENT OF THE CASE AND FACTS

The State accepts the statement of fact and of the case as contained in the initial brief as a substantially accurate recitation of the events of this case.

QUESTION CERTIFIED

In it's opinion, the Court of Appeal, First District, certified the following questions of great public importance to this Court:

> 1. WHEN A PERSON IS SENTENCED AS A YOUTHFUL OFFENDER PURSUANT TO CHAPTER 958.05(2), FLORIDA STATUTES (1979), DOES THE CIRCUIT COURT HAVE JURISDICTION TO REVOKE THE COMMUNITY CONTROL PROGRAM STATUS OF THAT PERSON?
>
> 2. IF THE ANSWER TO THE FOREGOING QUESTION IS IN THE POSITIVE, MAY THE CIRCUIT COURT, UPON REVOCATION OF A YOUTHFUL OFFENDER'S COMMUNITY CONTROL PROGRAM STATUS, TREAT THE DEFENDANT AS THOUGH IT HAD NEVER PLACED HIM IN COMMUNITY CONTROL AND SENTENCE HIM IN ACCORDANCE WITH SECTION 948.06(1), FLORIDA STATUTES?

Brooks v. State, No. AY-4 (Fla. 1st DCA, December 14, 1984) [9 FLW 2645]. The identical questions were certified in Clem v. State; however, the defendant elected not to invoke the jurisdiction of this Court. The issue is before this Court only in the instant cause and in Spurlock v. State, 449 So.2d 973 (Fla. 5th DCA 1984) cert. pending, Spurlock v. State, 65,450.

POINT ON APPEAL

THE TRIAL COURT HAS JURISDICTION TO REVOKE THE COMMUNITY CONTROL STATUS OF A DEFENDANT SENTENCED AS A YOUTHFUL OFFENDER TO A PERIOD OF CONFINEMENT FOLLOWED BY A PERIOD OF COMMUNITY CONTROL.

ARGUMENT

The record reflects that Petitioner Brooks was sentenced on June 20, 1979, on two counts of armed robbery. (R14-16). Brooks, who was sixteen years of age, was sentenced as a youthful offender to two six year terms: four years of the term to be confinement, followed by two years of community control supervision. R4,6,14.

Thereafter on September 20, 1983, Brooks was arrested and charged with armed robbery, grand auto theft, and abduction. R1. This incident[1] resulted in issuance of an affidavit and warrant for violation of probation for failure to abide by Condition 5 of the terms of release requiring the probation to "live and remain at liberty without violating any law." R17-18.

A revocation hearing was held on February 1, 1984, at which Brooks maintained the trial court was without jurisdiction to revoke his community control status.[2]

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[1] The arrest resulted in convictions for armed robbery and abduction. State v. Brooks, No. 83-8588-CF, per curiam affirmed, Brooks v. State, No. AY-307 (Fla. 1st DCA, December 20, 1984).

[2] This argument was not raised formally prior to the hearing. However inasmuch as jurisdiction may be challenged at any time, the argument must be considered timely. Dicaprio v. State, 352 So.2d 78 (Fla. 4th DCA 1977). Page v. State, 376 So.2d 901 (Fla. 2d DCA 1979).

Petitioner relied upon Clem v. State, No. 81-2243 (Fla. 4th DCA 1983) [8 FLW 2135]. At the time of the hearing, Clem v. State was pending rehearing. The trial court was unaware of the non-final nature of the Clem opinion, but queried why an appeal had not been taken. T119. Stating that Clem v. State was not, in the court's opinion, a correct statement of the law, the trial court declined to follow the Fourth District's holding in Clem and denied the motion to dismiss. T118-120. The Fourth District ultimately reversed its original opinion reaching the same conclusion as the trial court in this cause. See, Clem v. State, on rehearing [9 FLW 1868] (August 29, 1984).

In May, 1984, the Second District in Lollis v. State, 449 So.2d 430 (Fla. 2d DCA 1984), adopted the Clem rationale and held that jurisdiction over a violation of community control status lies exclusively with the Florida Parole and Probation Commission. A question of great public importance[3] was certified to the Florida Supreme Court. However the notice to invoke was untimely filed and State v. Lollis, No. 65,584, was dismissed sua sponte on July 16, 1984.

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[3] WHEN A YOUTHFUL OFFENDER HAS BEEN SENTENCED PURSUANT TO SECTION 958.05(2), FLORIDA STATUTES (1979), DOES THE CIRCUIT COURT HAVE JURISDICTION TO ENTER SANCTIONS AGAINST THE YOUTHFUL OFFENDER FOR VIOLATING THE TERMS OF HIS COMMUNITY CONTROL PROGRAM OR DOES NOT JURISDICTION OVER THE VIOLATION LIE EXCLUSIVELY IN THE PAROLE AND PROBATION COMMISSION? Lollis v. State at 432.

Shortly after Lollis v. State, the Fifth District rejected Clem v. State and stated that the trial court did indeed have jurisdiction to revoke the "probation" of a youthful offender sentenced to imprisonment and probation. Spurlock v. State, 449 So.2d 973 (Fla. 5th DCA 1984). Although the Fifth District did not certify a question, Spurlock v. State, No. 65,450, is pending before this Court; briefs on the merit have been filed. Express and direct conflict with Clem v. State is alleged.

Meanwhile in the Fourth District, supplemental pleadings were submitted and supplemental oral argument was conducted in Clem v. State. In addition, the record was supplemented and the Florida Parole and Probation Commission was permitted to enter as amicus curiae. See, Appendix, Exhibits I and II. On August 29, 1984, the Fourth District granted rehearing, acknowledged its earlier decision was erroneous and withdrew the opinion. Clem v. State, No. 81-2243 (Fla. 4th DCA, August 31, 1983) [9 FLW 1868]. The revised opinion states:

> In our opinion the circuit court's improvident placement of appellants on probation rather than in a community control program has no effect on the result in this case; had they sought review before committing any violation, we would merely have directed modification of the order of probation to reflect that they were to be placed in a community control program as in Cruse v. State, 432 So.2d 734 (Fla. 4th DCA 1983). The circuit court's improvident action in the present cases had no prejudicial effect on appellants, since the crucial effect of the orders in these

cases was to provide for appellants' spending only a portion of their original sentences in prison. No prejudice could have accrued to the appellants because probation entails less rigorous supervision than community control. Any error here is mere error, not jurisdictional error, and harmless error at worst. Appellants may not complain of any error in being placed on probation rather than in a community control program because they accepted the benefits of such improvident placement. Cf. King v. State, 373 So.2d 78 (Fla. 3d DCA 1982); Preston v. State, 411 So.2d 297 (Fla. 3d DCA 1982).

The jurisdictional issue arises from section 958.10, Florida Statutes (1979), and its apparent conflict with sections 958.05(2) and 958.14. Pursuant to section 958.05(2) the circuit court has jurisdiction to impose a maximum sentence upon a youthful offender of not more than six years, not more than four of which are to be served in prison and not more than two years in community control. If the youthful offender violates the terms of his community control, the circuit court has jurisdiction to proceed pursuant to section 958.14, which incorporates Section 948.06(1), to revoke the community control and pronounce sentence upon him. By authority of section 958.05(2) the circuit court initially ordered each appellant to incarceration and then a period of probation (which we held was meant to be community control). When they violated the terms of the probation/community control, the court had jurisdiction to sentence them pursuant to section 958.14. While we recognize that section 958.10 appears to create a conflict regarding who is in charge of the youthful offender while he is in community control and who may proceed against him in the event he violates the terms of the community control, we believe the jurisdiction of the sentencing circuit

> court is established by sections 958.05(2) and 958.14.

Id. at 1868-9. Questions of great public importance were certified to the Florida Supreme Court.[4]

It is well settled in Florida law that reviewing courts are to interpret statues in their plain and obvious meaning. Section 958.10, Florida Statutes, refers to "parole" in recognition that a youthful offender may be released from incarceration in one of two methods: parole, pursuant to Section 947, Florida Statutes, or release by accumulation of statutory gain-time allowances. Sections 958.05(2), 958.14 and 948.06(1), Florida Statutes, when read in pari materia, indicate that it is the trial court which initially evaluated the youthful offender, and imposed sentence designating community control status, which has the jurisdiction to continue review of

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[4] When a person is sentenced as a Youthful Offender pursuant to Chapter 958.05(2), Florida Statutes (1979), does the circuit court have jurisdiction to revoke the Community Control program status of that person?

If the answer to the foregoing question is in the positive, may the circuit court, upon revocation of a youthful offender's Community Control Program status, treat the defendant as though it had never placed him in community control and sentence him in accordance with section 948.06(1), Florida Statutes?

Clem v. State at 9 FLW 1869. As stated, the defendant did not invoke the jurisdiction of this Court. Clem is not pending further review. The issue is before this Court only in this cause and in Spurlock.

the offender and evaluate alleged violations of supervision. The Florida Parole and Probation Commission, as amicus curiae in other cases[5] raising this issue, has agreed with this position and has asserted two arguments in support thereof.

Firstly, the Commission deals only with parole matters, and should not become involved with actual sentences imposed upon an offender. Parole is neither an act of amnesty nor does it terminate a sentence imposed by the trial judge. Sellers v. Bridges, 15 So.2d 293 (Fla. 1943). The Commission is empowered to administer parole:

> Parole is that procedure by which a prisoner who must in any event be returned to society at sometime in the future is allowed to serve the last portion of his sentence outside prison walls and under strict supervision, as preparation for his eventual return to society.

Id. at 294. To the contrary, sentencing is clearly the function of the trial court. Any violation, or alleged violation, of the sentence must be evaluated and disposed of by the trial court. There is no provision within Chapter 958 which authorizes the Parole Commission to deal with an offender who has violated the terms of the community control provision of the original sentence.

Secondly, the Florida Parole and Probation Commission is an agency created by statute. §§947.001, et seq.

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[5] Clem v. State; and the following cases pending in the First District: State v. Jerry Lee Wilson, No. AZ-85 and State v. Frederick K. Jones, No. AX-462.

Florida Statutes. Therefore the Commission cannot exceed its legislatively delegated authority. See, Department of Environmental Regulation v. Falls Chase Special Taxing District, 424 So.2d 787 (Fla. 1st DCA 1983); Florida Department of Law Enforcement v. Hinson, 429 So.2d 723 (Fla. 1st DCA 1983). Nothing within Chapter 947 indicates an express or implied authority delegated by the legislature to deal with youthful offenders except where these offenders, as any other, are paroled. If the Commission were to act in the manner set forth by Petitioner and attempt to exercise jurisdiction over youthful offenders, a certain challenge would be forthcoming as the Commission would be acting outside its legislatively delegated authority.

Respondents submit the reasoning of the Fourth District in its opinion on rehearing is correct. Inasmuch as the case law initially relied upon by Petitioner has been withdrawn by the Fourth District and substituted with legal reasoning consistent with that voiced by the trial court, the State respectfully submits that the instant judgment and sentence must be affirmed. The State urges this Court to follow the revised opinion of the Fourth District in Clem v. State and the opinion of the Fifth District in Spurlock v. State, thereby holding that the trial court has the requisite jurisdiction to revoke the community control status of a defendant sentenced as a youthful offender to a period of confinement followed by a

period of community control. For the instant purposes, community control is tantamount to probation.

Once revoked, the trial court may "impose any sentence which it might have originally imposed before placing the offender on probation or into community control. Sections 958.14 and 948.06(1), Florida Statutes. Here Petitioner was sentenced to two consecutive six year terms, to be served as four years incarceration followed by two years of community control supervision. R12-13. Upon revocation, the trial court again sentenced Petitioner as a youthful offender to two years incarceration on each count to be served consecutively. R28. This is not error. Ellis v. State, 436 So.2d 342 (Fla. 1st DCA 1983) pet. review denied, 433 So.2d 980 (Fla. 1984); Waugh v. State, 406 So.2d 1238 (Fla. 2d DCA 1981); Brandle v. State, 406 So.2d 1221 (Fla. 4th DCA 1982); Greene v. State, 398 So.2d 1011 (Fla. 1st DCA 1981) pet. review denied, 406 So.2d 1118 (Fla. 1981); Newberry v. State, 444 So.2d 1011 (Fla. 1st DCA 1984) pet. review denied 451 So.2d 850 (Fla. 1984).

The youthful offender act was intended by the legislature as an alternative means of disposition for a certain class of criminal offenders. In enacting the act in 1978, the legislature declared its intent to be as follows:

> "The purpose of this act is to improve the chances of correction and successful return to the community of youthful offenders sentenced imprisonment

> by preventing their association with older and more experienced criminals in the terms of their confinement. It is the further intent of the legislature to provide an additional sentencing alternative to be used in the discretion of the court when dealing with offenders who have demonstrated that they can no longer be handled safely as juveniles and who require more substantial limitations upon their liberty to ensure the protection of society."

Ch. 78-84, §2, Laws of Fla. (1978) (emphasis added).

Given this statement of legislative intent, the factors underlying operation of the Youthful Offender Act are clear. By virtue of youth and inexperience, the legislature determined that the interest of society would best be served by allowing youthful offenders to be sentenced pursuant to a different set of rules than apply to adult offenders. Therefore a certain amount of discretion is vested in the sentencing court with regard to the eventual disposition of such offenders.

One facet of this discretion is that afforded the circuit court by Section 958.14, Florida Statutes (1983), which provides upon violation of terms of community control program, the youthful offender shall be subject to revocation pursuant to Section 948.06(1), Florida Statutes (1983). By its plain terms, §958.14 vested jurisdiction and discretion in the circuit court to deal with the alleged violations of the terms of the sentence which it imposed.

The act was intended by the legislature as a specific statutory scheme designed to deal with a particular class of offenders. Where the act is applicable, it is to be applied to the exclusion of adult sentencing statutes and concepts. See Nairn v. State, 417 So.2d 1092 (Fla. 3d DCA 1982); Waugh v. State, 406 So.2d 1238 (Fla. 2d DCA 1981). A portion of the specialized scheme vests jurisdiction and discretion in the trial court which originally opted for youthful offender sentencing to deal with alleged violations of terms of such sentence. §958.14, Florida Statutes (1983). It is fundamental that specialized statutory schemes should be construed in light of the evil to be remedied and the remedy conceived by the legislature to cure that evil. See Orlando Sports Stadium Incorporated v. State ex rel. Powell, 262 So.2d 881 (Fla. 1972). Therefore, the legislative intent would be effectuated by permitting the trial court to exercise its sound discretion in dealing with youthful offenders.

Furthermore, basic rules of statutory construction indicate that §958.14 is controlling.

> (T)he last expression of legislative will is the law, and, therefore, the last in point of time or order of arrangement prevails. This rule is applicable where the conflicting provisions appear in different statutes, (cite omitted) or in different provisions of the same statute. State v. Hialeah, 109 So.2d 368 (Fla. 1959).

Kiesel v Graham, 388 So.2d 594, 596 (Fla. 1st DCA 1980) (emphasis in original) Section 958.14 is last in

chronological order, and is the last expression of legislative will. Moreover, Section 958.14 was amended by the legislature in 1983, and if there was an intention to divest the circuit court of jurisdiction over youthful offenders who violate community control, it could have occurred at that time. Ch. 83-216, § 193, Laws of Florida (1983).

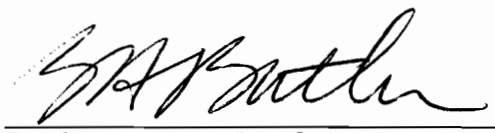
It is the legislative intent of the Youthful Offender Act to give sentencing judges alternatives in dealing with youthful offenders. The act evidenc an intention to permit trial judges to exercise that discretion, when initially affording youthful offender status, as well as upon violation of community control. The rules of statutory construction require that the last expression of legislative will be afforded deference. Section 958.14 is last in arrangement and in amendment. Therefore it seems clear that the legislature intended the circuit court to have jurisdiction over youthful offenders who violate community control imposed pursuant to Section 958.05(2).

CONCLUSION

Based on the foregoing reasons and citations of authority, Respondent respectfully submits that the judgment and sentence of the trial court should be affirmed and the questions certified should be affirmatively answered: the circuit court does have jurisdiction to revoke the community control status of a person sentenced as a youthful offender, and upon revocation, may treat the offender as though never placed in community control, and sentence the offender pursuant to Section 948.06(1), Florida Statutes.

Respectfully submitted,

JIM SMITH
ATTORNEY GENERAL



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by mail to Terry P. Lewis, Special Assistant Public Defender, Post Office Box 10508, Tallahassee, Florida 32302, this 6th day of March, 1985.

Barbara Ann Butler
Assistant Attorney General

BAB/rsb
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