IN THE SUPREME COURT OF FLORIDA

LONNIE E. POORE,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

CASE NO. 70,397

PETITIONER'S BRIEF ON JURISDICTION

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PETITIONER'S BRIEF ON JURISDICTION

PRELIMINARY STATEMENT

Petitioner was the Defendant/Appellant and Respondent was the Prosecution/Appellee in the District Court of Appeal, Fifth District of the State of Florida. The parties will be referred to as they appear before this Honorable Court.

STATEMENT OF THE CASE AND FACTS

Petitioner was sentenced on September 9, 1982, as a youthful offender, to spend two and a half years in prison, followed by two years on probation, for grand theft of a motor vehicle. (R 32-33, 9) On August 14, 1985, he entered pleas of guilty to each allegation that he violated his probation by changing his residence without permission and by failing to maintain employment while on probation. (R 3, 8, 34-35) His probation was revoked and he was sentenced to spend five years in prison. (R 21-22, 50, 52-54) During Petitioner's timely appeal to the Fifth District Court of Appeal, jurisdiction was relinquished to the trial court and, on January 6, 1986, the five-year sentence was vacated and Petitioner was sentenced to spend four and a half years in prison. (SROA)

On February 5, 1987, the Fifth District Court of Appeal reversed and vacated the August 14, 1985, sentence. Poore v. State, 12 FLW 450 (Fla. 5th DCA February 5, 1987). Petitioner's motion for rehearing and/or motion for rehearing en banc or suggestion of mootness was denied on March 17, 1987. Petitioner filed a notice in the Fifth District Court of Appeal to invoke this Honorable Court's discretionary jurisdiction on April 16, 1987.

SUMMARY OF ARGUMENT

The District Court's decision, that upon violation of the probation portion of a split sentence a defendant is not subject to being resentenced but to simply serving the balance of the total split sentence, directly conflicts with Florida Supreme and District Courts decisions which have authorized resentencing in such cases, to any sentence which the trial court might have originally imposed. The instant decision further conflicts with and contravenes the sentencing guidelines approved by the Supreme Court which limit the incarcerative portion of a split sentence to the guidelines range; which limit the sentence upon revocation of probation or community control to the next higher presumptive guidelines range; and which otherwise require that the sentencing judge given written reasons for a guidelines departure.

ARGUMENT

THE DISTRICT COURT OF APPEAL'S DECISION DIRECTLY AND EXPRESSLY CONFLICTS WITH THE DECISIONS IN BROOKS v. STATE, 478 So.2d 1052 (Fla. 1985); THE FLORIDA BAR: AMENDMENT TO RULES OF CRIMINAL PROCEDURE (3.701, 3.988--Sentencing Guidelines), 468 So.2d 220 (Fla. 1985); VILLERY v. FLORIDA PAROLE AND PROBATION COMMISSION, 396 So.2d 1107 (Fla. 1981); HILL v. STATE, 486 So.2d 1372 (Fla. 1st DCA 1986); CROSBY v. STATE, 487 So.2d 416 (Fla. 2d DCA 1986); AND LYNCH v. STATE, 491 So.2d 1169 (Fla. 4th DCA 1986).

Petitioner's sentence, imposed following revocation of the probation portion of his original split sentence as a youthful offender, was reversed and vacated, "not because it is an improper guideline sentence but because it should not have been imposed at all." Poore v. State, 12 FLW 450 (Fla. 5th DCA February 5, 1987). (Appendix 1) The District Court wrote:

> . . . When the defendant violates a condition of probation or community control which is part of a split sentence, that violation is not the basis for an original sentencing, as it is when a defendant is originally placed on probation or community control in lieu of confinement. The subsequent violation of probation or community control in a split sentence serves only to eliminate the condition under which [the] defendant was released from confinement under the original sentence and the defendant is not resentenced but is recommitted to the Department of Corrections for service of the remainder of that original sentence.

(Appendix 4)

This holding, that Petitioner was not subject to being resentenced for

the same offense for which he had been on probation but to being recommitted to prison for the balance of his split sentence, is in direct and express conflict with decisions by this Honorable Court and by other Florida District Courts of Appeal.[1] In Brooks v. State, 478 So.2d 1052 (Fla. 1985), this Honorable Court held that when a person is sentenced as a youthful offender, upon revocation of his youthful offender community control status, the circuit court may sentence him in accordance with Section 948.06(1), Florida Statutes. Brooks had been sentenced, as a youthful offender, in 1979, to consecutive split sentences of four years in prison plus two years in a community control program for each of two counts of armed robbery. Likewise in Hill v. State, 486 So.2d 1372 (Fla. 1st DCA 1986), the District Court upheld a sentence imposed after the revocation of Hill's community control. Hill had been sentenced to a "split sentence" in 1980 as a youthful offender. In Lynch v. State, 491 So.2d 1169 (Fla. 4th DCA 1986), the Fourth District Court approved a nine-year sentence imposed after revocation of Lynch's probation which had been part of a youthful offender sentence. The Second District Court held, in Crosby v. State, 487 So.2d 416 (Fla. 2d DCA 1986), that the trial court was free to sentence Crosby in any manner authorized by Section 948.06(1), after Crosby had violated the community control portion of an original split sentence. See Crosby v. State ("Crosby I"), 462 So.2d 607 (Fla. 2d DCA 1985). Section 948.06(1) authorizes the trial court, upon revocation of probation or community control, to impose any sentence that might have originally been imposed.

The District Court's decision also is in conflict with this Honorable

1. The decision also conflicts with other decisions of the Fifth District Court of Appeal, e. g., Johnson v. State, 482 So.2d 398 (Fla. 5th DCA 1985), and Boldes v. State, 475 So.2d 1356 (Fla. 5th DCA 1985); but Petitioner's motion for rehearing en banc, etc., was denied by the District Court.

Court's approval of the Sentencing Guidelines in The Florida Bar: Amendment to Rules of Criminal Procedure (3.701, 3.988--Sentencing Guidelines), 468 So.2d 220 (Fla. 1985), and The Florida Bar Re: Rules of Criminal Procedure (Sentencing Guidelines, 3.701, 3.988), 482 So.2d 311 (Fla. 1985). Rule 3.701(d)(12) authorizes the imposition of a split sentence whose total sanctions (incarceration plus probation) are limited only by general law, so long as the incarcerative portion of the split sentence does not exceed the sentencing guidelines' recommended range. See Committee Note to Sentencing Guidelines, supra, 468 So.2d at 225. Rule 3.701(d)(14) limits the term of incarceration following revocation of probation or community control to the next higher guidelines range, unless written reasons for departing further are given. See Rule 3.701-(d)(11), Fla.R.Crim.P. The District Court's decision, that violation of the probation or community control portion of a split sentence will automatically and always result in incarceration for the balance of a split sentence, authorizes departures from the sentencing guidelines without requiring written reasons therefor, in contravention of Rule 3.701(d)(11) and State v. Jackson, 478 So.2d 1054 (Fla. 1985).

The District Court decision's conflict with Villery v. Florida Parole and Probation Commission, 396 So.2d 1107 (Fla. 1981), is explained by Judge Sharp's concurrence in the result in this case:

> Further, the disparity between treatment of split sentences and probation or other sentencing alternatives is contrary to the teachings of Villery v. Florida Parole and Probation Commission, 396 So.2d 1107 (Fla. 1981). The Florida Supreme Court in that case described incarceration as a condition of probation as "also known as the split sentence probation alternative." It treated both kinds of sentences of dispositions the same, limiting the incarceration time to one year.

> That was later statutorily repealed by sections 921.1[8]8 and 948.01(4) for split sentences, but the balance of Villery remains good law. The court further held that after probation is revoked for either kind of disposition, the court can impose any sentence it originally could have made. The only limitation for split sentences in Villery is that credit must be given for prison time served.

(Appendix 9)(Footnotes omitted.) (Emphasis in original.)

The District Court's instant decision, therefore, conflicts with decisions of this Honorable Court and of other District Courts of Appeal, and contravenes the Rules of Criminal Procedure approved by this Honorable Court to govern imposition of sentences.

CONCLUSION

For the reasons expressed herein, Petitioner respectfully requests that this Honorable Court exercise its jurisdiction in this cause and review the District Court of Appeal's decision herein.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to the Honorable Robert Butterworth, 125 N. Ridgewood Avenue, Daytona Beach, Florida 32014, by hand delivery to his basket at the Fifth District Court of Appeal, this 27th day of April, 1987.

ATTORNEY