0/A 12-3-81 G-26

IN THE SUPREME COURT OF FLORIDA

LONNIE E. POORE,

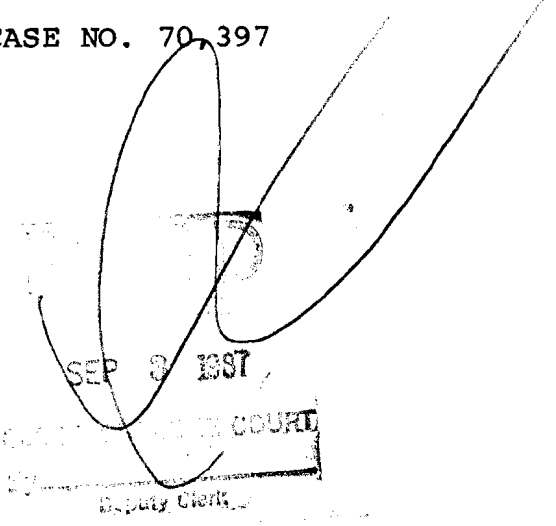
Petitioner,

v.

STATE OF FLORIDA,

Respondent.
_____/

CASE NO. 70,397



RESPONDENT'S BRIEF ON THE MERITS

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

SEAN DALY
ASSISTANT ATTORNEY GENERAL
125 N. Ridgewood Avenue
Fourth Floor
Daytona Beach, FL 32014
(904) 252-1067

COUNSEL FOR RESPONDENT

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AUTHORITIES CITED

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SUMMARY OF ARGUMENT

The district court determination that the imposition of the "true" split sentence in this case in 1982 constituted the only valid sentencing of the appellant under Florida law such that no resentencing occurred in 1985 upon revocation of the probationary portion of the petitioner's youthful offender sentence is supported by reasonable interpretation of statute and case law. Since no sentencing or resentencing proceeding in actuality occurred in 1985 the sentencing guidelines were inapplicable and no reasons for departure were necessary.

Alternatively, assuming arguendo that the district court erred in its determination that the guidelines were inapplicable the "sentence" allegedly imposed upon revocation of probation in 1985 was not improper in that the reasons for departure outlined by the sentencing court provide a clear and convincing basis for the ultimate sentencing determination.

ARGUMENT

WHETHER THE DISTRICT COURT ERRED IN REVERSING THE TRIAL COURT'S CONSIDERED SENTENCING DETERMINATION?

This case began as a dispute between the state and Poore as to whether he could properly be sentenced to a four and one-half year term of imprisonment upon revocation of the probationary portion of a split sentence originally imposed pursuant to Youthful Offender Act classification on September 9, 1982. (R 32-33) (A I,II)[1] The original judgment and sentence provided for commitment to the Department of Corrections for a term of four and one-half years as a youthful offender but provided that after Poore had served two and one-half years of incarceration he would be placed on probation for the remaining two year period. On August 14, 1985, after Poore had served the initial incarcerative portion of his sentence the trial court revoked his probation and then sentenced him to five years incarceration; however, after relinquishment of jurisdiction during the pending appeal the trial court amended that sentence to four and one-half years imprisonment with credit for time already served. (R 52-54, SR 1-3) Also during the relinquishment period the trial court entered an order listing its reasons for departing from the recommended guidelines sentence of any non-state prison sanction which reasons included findings that the petitioner had violated his probation and that:

"Sentencing within the guidelines

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[1] (A) Refers to the appendix hereto.

> **would result in no additional punishment, as defendant has already served more time in the Department of Corrections than a guideline sentence would allow."** (SR 4, 5-5A)

The only two issues addressed by the parties in the appeal of the sentence to the district court were whether the trial court could properly impose a term of imprisonment of more than four years upon revocation of probation/community control under the Youthful Offender Act (Point I) and whether the trial court erred in departing from the recommended guidelines sentence of any non-state prison sanction in imposing the four and one-half year sentence upon probation revocation for the reasons given where the actual sentence when evaluated in terms of credit for time served amounted to only two years of additional incarceration (Point II). (A I,II) Neither party addressed the issue sua sponte raised by the district court majority as the basis for its February 5, 1987 opinion vacating the August 14, 1985 sentence. The district court remanded "for recommitment of the defendant to confinement under the sentence of September 9, 1982" because no authority existed to impose "a second sentence" in 1985 after revocation of probation such that Poore "had no right to elect to be sentenced or resentenced under the sentencing guidelines because he had no right to be sentenced a second time at all." Poore v. State, 503 So.2d 1282, 1285-1286 (Fla. 5th DCA 1987) The petitioner sought rehearing of the district court decision, noting inter alia, the fact that Poore's term of sentence had in fact already been served and expired such that the sentencing challenges were moot.

The detailed majority opinion makes clear the rationale and legal authority for the district court's ultimate conclusion that the split sentence originally imposed in this case was the only valid sentence ever imposed such that no resentencing triggering sentencing guidelines applicability was ever authorized. Certainly, as correctly noted by the district court the actual 1982 "Judgment, Sentence and Order Placing Defendant on Probation During Portion of Sentence" does provide notice to Poore that he was at that time in fact "committed to the Department of Corrections for a term of four and one-half years as a youthful offender", and likewise informed Poore that "the Court may revoke your probation and require you to serve the balance of said sentence." (R 32-33) The language of the sentencing order in this particular case as well as the ultimate 1985 "sentencing" determination of the trial court which in effect simply required Poore "to serve the balance" of his 1982 sentence does support the district court conclusion that no "resentencing" was necessary or even authorized since the original 1982 sentence established the incarcerative limits such that no new sentence could ever actually be imposed. This theory does appear, however, to run contrary to this Court's prior examination and explanation of trial court procedure and authority in the context of "split sentence" probation revocation in State v. Holmes, 360 So.2d 380 (Fla. 1978) and State v. Jones, 327 So.2d 18 (Fla. 1976).

In Jones, this Court sought to explain the ramifications of "split sentences" and, inter alia, rejected a district court

interpretation of then Section 948.01(4), Florida Statutes[2], which required the trial judge at the initial sentencing proceeding to impose a total sentence immediately followed by the withholding of a part thereof for use in the event probation was violated. The Jones Court went on to note that this interpretation conflicted with the language of Section 948.06, Florida Statutes (1973), which authorized trial judges upon revocation of probation to impose any sentence which might have been originally imposed before placing the defendant on probation.[3] The Jones Court specifically found "no legislative intent to require an initial imposition of the total sentence" as a condition of fashioning a split sentence under Section 948.01(4). The district court majority below, would apparently distinguish Holmes and Jones, based upon this Court's language in Villery v. Florida Parole and Probation Commission, 396 So.2d 1107, 1109-1110 (Fla. 1980) distinguishing between true split sentences and the imposition of probation with a condition of incarceration.

According to the Villery Court the Jones decision involved

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[2] As noted by the district court in its opinion below at footnote 6 the language of Section 948.01(4), Florida Statutes (1981), has been amended and transferred to Section 948.01(8); however, the phraseiology noted as key by the district court has not been altered in subsequent amendments and remains the same as that considered in Jones and Holmes.

[3] The particular language of Section 948.06 at issue remains substantially unchanged, as it did at the time of Poore's sentencing, as (1) of the same statute section. See, Section 948.06(1), Florida Statutes (1981) and (1985).

"the subject of incarceration as a condition of probation, also known as the split sentence probation alternative." 396 So.2d at 1109. The Villery Court went on to recede from that portion of the Jones decision which held that a trial court may place a defendant on probation and include, as a condition, incarceration for any specific period of time within the maximum sentence allowed as part of its broader holding in the case that incarceration under split sentencing alternatives (either incarceration as a condition of probation or incarceration followed by specified period of probation, i.e., a true split sentence) cannot exceed one year. As partial support for this holding the Villery Court stated:

> **Two basic alternatives are available to the trial judge at the time of sentencing. He may either sentence the defendant or he may place him on probation. The term "sentence" is defined in rule 3.700 of the Florida Rules of Criminal Procedure as "the pronouncement by the Court of the penalty imposed upon a defendant for the offense of which he has been adjudicated guilty." Generally, a fine or a sentence of imprisonment or both is the "penalty" which may be imposed. Rule 3.790(a) of the Florida Rules of Criminal Procedure states that the pronouncement shall not be made upon a defendant who is placed on probation regardless of whether he is adjudicated guilty. This rule is consistent with section 948.01(3), Florida Statutes (1979), which requires the court to stay and withhold the imposition of a sentence in placing a defendant on probation. Only after probation is revoked may pronouncement and imposition of a sentence be made upon a defendant. Fla. R. Crim. P. 3.790(b). In such event the court may impose any sentence which it**

> might have originally imposed before placing the defendant on probation. §948.06(1), Fla. Stat. (1979).
>
> Once a sentence is imposed, a defendant falls within the jurisdiction of the Parole and Probation Commission under the authority granted to the Commission pursuant to section 947.16, Florida Statutes (1979). If however, sentence is withheld and the defendant is placed on probation, he is generally committed to the supervision and control of the Department of Corrections. The court which placed the defendant on probation retains jurisdiction over the defendant for purposes of terminating, notifying or revoking probation. See §§ 948.04-.06, Fla. Stat. (1979)

Id. at 1110. (footnote omitted)

The Villery Court also noted the previous decision in Holmes as holding in part that the combined period of incarceration and probation imposed under the split sentence alternative must be within the maximum period of incarceration provided by the particular criminal statute involved. No mention was made of the fact that in Holmes the Court specifically authorized trial judges to sentence defendants to a period of incarceration followed by a period of probation under section 948.01(4) and allowed trial judges upon revocation of that probation to impose any sentence which they might have originally imposed minus jail time previously served "as a part of the sentence". 360 So.2d at 383.

Poore's 1982 judgment and sentence does not impose incarceration as a condition of probation as correctly noted by the district court; thus, under the majority rationale since

under Villery a sentencing judge has only "two basic alternatives", i.e., either sentencing or probation, Poore must have been sentenced in 1982 and could not therefore be resentenced in 1985 upon the revocation of his probation. 396 So.2d 1110. Certainly, the specific language of the 1982 sentencing order supports the conclusion that Poore was in fact sentenced at that time and Villery's language lends support to that conclusion. The specific language of section 948.01(4), Florida Statutes (1981), likewise supports the district court majority analysis in that it authorizes the judge "at the time of sentencing" to direct a defendant to be placed on probation for "any specified period of such sentence" and to "stay and withhold the imposition of the remainder of sentence imposed upon the defendant..."

If, as determined by the district court majority the imposition of "true" split sentences even in the youthful offender context was governed by the authority of section 948.01(4), Florida Statutues (1981), such that the entire potential incarcerative sentence must be established at sentencing at that point in time, then the district court's determination that the subsequently enacted sentencing guidelines did not affect the imposition of the "remainder" of the youthful offender sentence in this case upon the 1985 revocation of probation was correct. The crime at issue in this case was committed well before the October 1, 1983, effective date of the guidelines and Poore's "sentencing" also necessarily occurred well before guidelines implementation. §921.001(4)(a), Fla. Stat.

(1985). Here, upon analysis of the "two basic alternatives" noted in Villery, it must be determined that Poore did in fact have sentence imposed upon him in this case in 1982 such that no resentencing or imposition of sentence after revocation of probation as contemplated by section 948.06(1), where the probationary alternative is in fact utilized, has occurred so as to trigger the guidelines. Fla. R. Crim. P. 3.701(d)(14)

Even assuming arguendo that the district court majority rationale somehow miscontrues the import of Villery and the apparently specific language of the statutory sections at issue so as to distinguish the two types of split sentences because as asserted by Poore "no more than semantics is involved" the respondent would then respectfully urge this Court to affirm the trial court's sentencing determination in this case based upon the arguments originally made by the state in their answer brief before the district court. (A II)

As apparently conceded by the petitioner this Court has in Brooks v. State, 478 So.2d 1052 (Fla. 1985), determined that upon revocation of youthful offender community control status the trial court may sentence the defendant in accordance with section 948.06(1) to any sentence which might have been originally imposed notwithstanding youthful offender status. Accord: Lynch v. State, 491 So.2d 1169 (Fla. 4th DCA 1986); Crosby v. State, 487 So.2d 416 (Fla. 2d DCA 1986); Hill v. State, 486 So.2d 1372 (Fla. 1st DCA 1986); Johnson v. State, 482 So.2d 398 (Fla. 5th DCA 1985). Similarly, under the peculiar factual circumstances of this case the stated rationales for guidelines departure were

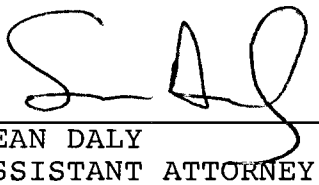
more than sufficient to justify imposition of the sentence always intended and determined appropriate by the sentencing court since 1982. Indeed, the notation by the sentencing judge that sentencing within the guidelines would in fact result in no additional punishment for Poore despite the fact of his probation violation, in concert with the court's notation that he had in fact violated his probation, clearly serves to support what was in effect only a two year sentence (after credit for time served). Accordingly, Poore would have fallen under the second guideline cell such that the fact that he violated his probation would in and of itself have authorized the judge to impose the de facto second cell sentence. (SR 4, 5-5A) Fla. R. Crim. P. 3.701(d)(14). Thus, even aside from the fact that this whole cause is moot vis-a-vis a petitioner who has already served the sentence at issue, no actual detriment befell Poore from the district court determination since the guidelines departure would have been proper. It is clear that the sentencing judge thought the sentence proper when he imposed it in 1982 and 1985 and given the propriety of at least one of the departure rationales the state submits that it is clear beyond a reasonable doubt that the same sentence would be imposed even upon remand. Griffis v. State, 12 F.L.W. 424 (July 16, 1987); Albritton v. State, 476 So.2d 158 (Fla. 1985).

CONCLUSION

Based on the argument and authorities presented herein the respondent respectfully requests this honorable court affirm the district court decision or in the alternative reinstate the sentence imposed by the trial court.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

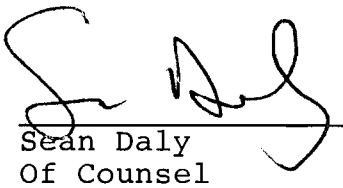


SEAN DALY
ASSISTANT ATTORNEY GENERAL
125 N. Rdigewood Avenue
Fourth Floor
Daytona Beach, FL 32014
(904) 252-1067

COUNEL FOR RESPONDENT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above brief on the merits and appendix thereto has been furnished, by delivery, to Brynn Newton, Assistant Public Defender, at 112 Orange Avenue, Daytona Beach, Florida 32014, this 1st day of September, 1987.



Sean Daly
Of Counsel