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Aneg.

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

vs.

CASE NO. 71,420

CLYDE GARLAND WAYNE,

Respondent.

PETITIONER'S BRIEF ON MERITS

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STATEMENT OF THE CASE AND FACTS

On January 11, 1985, the respondent was charged, by information, with having committed burglary of a structure and petit theft (R 7). On June 21, 1985, respondent pled guilty and was sentenced to 30 months in prison followed by 2 1/2 years probation on the burglary charge (R 9-10). Respondent received a 60 day jail sentence on the petit theft charge, to run concurrently with the sentence imposed for the burglary charge (R 10).

With regard to the probationary portion of respondent's sentence, the trial court withheld imposition of sentence and did not impose a prison term upon respondent (R 9). In order to remain on probation, respondent was required to comply with certain probationary conditions (R 9-10). Respondent's probationary freedom and the withholding of sentencing was conditioned upon respondent's compliance with the conditions of probation (R 9). Respondent was notified that if he violated the conditions of his probation, he could be arrested, his probation could be revoked, and that the trial court could then impose any sentence which it might have imposed before placing him on probation (R 9). Respondent agreed to these terms and signed the order of probation, indicating that the conditions of his probation had been explained to him (R 9).

On September 3, 1986, a warrant for respondent's arrest for violation of probation was issued (R 12). Respondent was charged with violating the conditions of his probation by failing to make three reports to the probation office as instructed by his

probation officer, failing to make three written monthly reports to his probation officer, and failing to pay his costs of supervision (R 11-12).

On November 13, 1986, respondent pled guilty to the probation violation (R 16-17). The trial court accepted the plea (R 3), revoked respondent's probation, and sentenced respondent to four (4) years in prison (R 4). This sentence was a departure from the sentence recommended by Florida's Sentencing Guidelines (R 14-15). The trial court wrote that it was departing from the recommended sentence because respondent had "previously received 60 months D.O.C. in this case" and that "sentence of 3 1/2 years would be almost like no sentence at all." (R 14).

Respondent appealed his sentence to the Fifth District Court of Appeal (R 22). The only issue presented in the appellant's brief was the validity of the reason given for departure by the trial court. The District Court of Appeal, sua sponte, addressed the issue of the application of the double jeopardy clauses of the Florida and United States Consitutions to the sentencing of respondent following the revocation of his probation and reversed his sentence, holding that the sentence violated double jeopardy principles. See, Wayne v. State, 513 So.2d 689 (Fla. 5th DCA 1987).

On September 14, 1987, petitioner filed a motion for rehearing. Rehearing was denied on October 6, 1987. Petitioner sought to invoke the discretionary jurisdiction of this court on November 5, 1987, on the basis that the decision of the district court construed a provision of the Florida and United States

Constitution, and that it expressly and directly conflicted with other decisions on the same question of law. This court accepted jurisdiction on February 17, 1988.

SUMMARY OF ARGUMENT

The language of section 948.06(1), Florida Statutes (1985) is applicable to split sentence provisions. When a defendant violates his probation, the trial court can revoke that probation and impose any sentence it might have originally imposed before placing the offender on probation. Further, a term of incarceration followed by a period of probation is a split sentence to which the foregoing principles apply, and as such, it is not necessary that the trial court establish a term of sentence and withhold part of it for later imposition. Should this court determine that double jeopardy prevents the imposition of a "second sentence" following revocation of probation, an offender's acceptance of probation and agreement to abide by its terms should be considered a waiver of those double jeopardy rights.

POINT ON APPEAL

THE DISTRICT COURT ERRED IN DETERMINING THAT RESPONDENT'S SPLIT SENTENCE WAS "ERRONEOUS", AND THAT DOUBLE JEOPARDY PREVENTED HIM FROM BEING "RESENTENCED" UPON REVOCATION OF HIS PROBATION.

Respondent originally pled guilty to burglary of a structure, and was sentenced to thirty months' incarceration followed by two and one-half years probation. After respondent had served the incarcerative portion of the sentence, a warrant was issued for his violation of probation. Respondent admitted the violations of probation, and the trial court revoked his probation and sentenced him to four years' incarceration, with credit for the time previously served.

Respondent appealed his sentence to the Fifth District Court of Appeal, contending that the sentence constituted a guidelines departure and the reason given by the trial court was invalid. The district court sua sponte addressed the application of the Double Jeopardy Clause to the sentencing of respondent following the revocation of his probation. The court reversed respondent's sentence, holding that he could not constitutionally be sentenced a second time for the same offense merely because he had violated the probation appended to the lawful sentence of confinement. Wayne v. State, 513 So.2d 689 (Fla. 5th DCA 1987).

In reaching its conclusion, the district court determined that due to the method in which respondent's original sentence had been imposed (confinement merely followed by probation), constitutional double jeopardy prevented him from being sentenced "a second time" for the same offense. Id at 691. The court

reasoned that where a sentence of confinement is served in full before a defendant is released on probation, there is no suspended portion of the original sentence left to be served when the defendant violates his probation. Id. The district court relied in part on its reasoning in Poore v. State, 503 So.2d 1282 (Fla. 5th DCA 1987), rev. pending, Supreme Court Case No. 70,397, in reaching this conclusion.

At the outset petitioner points out that this is a multi-faceted case, due to the district court's reliance on Poore. As such, the Poore analysis that was applied to the instant case must be addressed. Petitioner will first address the Poore court's incorrect determination that the language of section 948.06(1) is inapplicable to split sentence provisions. Petitioner will further argue that even if this court determines that the Poore court was correct in determining that a defendant may only be "recommitted" as opposed to "resentenced", the district court erred in the instant case in construing respondent's sentence as an "erroneous split sentence", thereby preventing "recommittment". In light of the fact that these cases have opened a veritable Pandora's box of sentencing problems, petitioner will also discuss the implications on future sentencing proceedings.

The Past: Poore and Double Jeopardy

In its Poore decision, the district court stated that the language of section 948.06(1), Florida Statutes, has no applicability to the split sentence provisions contained in section 948.01(8), Florida Statutes (1985). The language the

court was referring to is that after probation is revoked, the court shall "impose any sentence which it might have originally imposed" before the offender was placed on probation. The court concluded that there is no authority to impose a second sentence following a valid prior split sentence for the same conviction or offense, and to do so invited double jeopardy problems. Id. at 1285. Petitioner submits that the Poore court utilized a premise that is contrary to this court's previous rulings, and therefore reached an invalid conclusion that it applied to the instant case. As such, the decision in the instant case should be quashed.

This court has previously recognized that one who has been sentenced to a period of incarceration and then given probation may, upon revocation of probation, be resentenced to any term which might have originally been imposed, regardless of whether the term of the second sentence exceeds that of the first. State v. Jones, 327 So.2d 18 (Fla 1976); State v. Holmes, 360 So.2d 380 (Fla. 1978). In Jones, this court held that a trial court may revoke the probation and incarceration provision at any time during the period that the order is in effect and impose any sentence which it might have originally imposed, and that upon such recovation, the defendant must be given credit for all time served pursuant to a split sentence probation order. Id. at 25. This court recently recognized its Jones holding as:

> that a defendant placed on probation pursuant to section 948.01(4), Florida Statutes (1973), who subsequently violates that probation may be sentenced to imprisonment by the trial judge for the same period

> of years as the court could have originally imposed, without the necessity of establishing a term of sentence and withholding a part of it at the initial sentencing proceedings.

Van Tassel v. Coffman, 486 So.2d 528 (Fla. 1986). In Holmes, this court held that where probation is revoked, a trial court may impose any sentence which it might have originally imposed minus jail time previously served as part of the sentence, and further, that no credit shall be given for time spent on probation. Id. at 383.

This court has also addressed the issue of the constitutionality of increased "second sentences", and found them to be proper. State v. Payne, 404 So.2d 1055 (Fla. 1981). The court first recognized its Jones and Holmes holdings, and went on to discuss the double jeopardy implications. The court approved and adopted the reasoning of Justice Frankfurter in his dissenting opinion in Roberts v. United States, 320 U.S. 264, 64 S.Ct. 113, 88 L.Ed.2d 41 (1943).

Justice Frankfurther pointed out that we "should not countenance the notion that a probationer has a vested interest in the original sentence nor encourage him to weigh the length of such a sentence against any advantages he may find in violating his probation. To bind the court to such a sentence is undesirable in its consequences and violative of the spirit of probation." Id. at 274, 64 S.Ct. at 118. This court then concluded that it is a defendant's conduct which results in the stiffer "second" sentence, and imposition of the same does not offend the safeguards of the Fifth Amendment. Payne, 404 So.2d

at 1059. Petitioner submits that the district court below conferred upon respondent a vested interest in his original sentence, allowed him to take advantage of violating his probation, thereby violating the spirit of probation and encouraging these undersirable consequences, all of which runs contrary to the reasoning adopted by this court.

Even if this court were to determine that this sentencing procedure implicates the Double Jeopardy Clause, petitioner argues that a situation such as this should be considered one of those limited instances where a defendant knowingly waives his double jeopardy rights. See State v. Johnson, 483 So.2d 420 (Fla. 1986). The sentencing form found in rule 3.986, Florida Rules of Criminal Procedure, with which the district court took issue, provides that a defendant is placed on probation "under supervision of the Department of Corrections according to the terms and conditions of probation set forth in a separate order entered herein." Petitioner notes that this is found in the method of imposing "split sentences" which the district court determined to be "erroneous", as well as the one which it deemed "proper". The separate order in the instant case specifically states:

> You are hereby placed on notice that the court may at any time rescind or modify any of the conditions of your probation, or may extend the period of probation as authorized by law, or may discharge you from further supervision; and that if you violate any of the conditions of your probation, you may be arrested and the Court may revoke your probation and impose any sentence which it might have imposed before placing

you on probation (emphasis supplied).

(R 9). There is also a place for the probationer to sign, acknowledging that the conditions have been explained to him.

In the first place, this indicates that respondent's sentence was not "served in full" as the district court determined. Petitioner further submits that the trial court's agreement to place respondent on probation was conditioned on respondent's compliance with the restrictions and obligations contained in the probation order. In accepting the probation terms, respondent agreed that if he violated those terms, the trial court could revoke his probation and impose any sentence which it might have imposed before placing him on probation. Respondent received the benefit of his bargain, which was probation in lieu of a longer term of incarceration. It would be unjust under these circumstances for a defendant to be heard to say his sentence was illegally imposed, for he not only receives the benefit of his bargain, but an additional windfall. A defendant not only receives a shorter term of incarceration, he does not have to abide by the terms and conditions of probation.

An analogous situation is found in Ricketts v. Adamson, 107 S.Ct. 2680 (1987). In that case, the Supreme Court held that where the acceptance of a guilty plea by the trial court was conditioned upon the defendant's performance of a plea agreement, and the defendant later refused to abide by the plea agreement, the defendant's plea to and sentence for second degree murder could be set aside, and the defendant could be convicted of and sentenced to death for first degree murder, despite the fact that

he had already begun serving his initial sentence. Such procedure was held not to violate double jeopardy principles. Just as the agreement of the defendant in Ricketts amounted to a waiver of double jeopardy rights, the agreement of the resondent in the instant case that the trial court could impose any sentence which is might have imposed before placing respondent on probation also represents a waiver to any "resentencing" upon violation of probation.

The district court erred in applying double jeopardy principles to the instant case. This court has recognized that a defendant does not have a vested interest in his original sentence, and where it is the defendant's conduct that causes the stiffer sentence, imposition of it does not offend the Fifth Amendment. Further, although respondent did not explicity state that he was giving up the right to assert a double jeopardy claim, he did accept the probation and agree to its terms. Finally, respondent never did assert a double jeopardy claim, rather the district court sua sponte addressed the issue.

The Present: Split Sentence Alternatives

The district court determined that "imposing a period of confinement merely followed by a period of probation" is an erroneous method of imposing a split sentence, because when the period of confinement is served in full before the defendant is released on probation and later violates that probation, there is no suspended portion of the original sentence of confinement left to be served. Wayne, 513 So.2d at 690-91. Petitioner contends that the reasoning of the district court promotes form over

substance, and runs contrary to prior decisions of this court as well as statutory law pertaining to the trial court's authority and the procedure for "split sentence" probation revocation. Jones, supra; Holmes; supra; §§948.01(8), 948.06(1) and 921.187(1)(g) Fla. Stat. (1985).

Section 921.187(1)(g), Florida Statutes (1985) provides that a court may:

> Impose a split sentence whereby the offender is to be placed on probation upon completion of any specified period of such sentence, which may include a term of years or less.

In addition, section 948.01(8), Florida Statutes (1985) states:

> (8) Whenever punishment by imprisonment for a misdemeanor or a felony, except for a capital felony, is prescribed, the court, in its discretion, may at the time of sentencing impose a split sentence whereby the defendant is to be placed on probation or, with respect to any such felony, into community control upon completion of any specified period of such sentence which may include a term of years or less. In such case, the court shall stay and withhold the imposition of the remainder of sentence imposed upon the defendant and direct that the defendant be placed upon probation or into community control after serving such period as may be imposed by the court. The period of probation of community control shall commence immediately upon the release of the defendant from incarceration, whether by parole or gaintime allowances.

Petitioner submits that the plain meaning of these statutes provides for a split sentence composed of incarceration followed by a period of probation. It would be ludicrous for this issue

to turn on the trial court's saying the magic words "I withhold imposition of the remainder of sentence and place you on probation", for that is precisely what the court does by imposing incarceration followed by probation. It is interesting in the instant case that the district court's decision turned on the sentence form contained in rule 3.986, Florida Rule of Criminal Procedure, when there was no such form contained in the record in appeal related to respondent's initial sentence. It is entirely possible that in the instant sentencing game, the trial court maneuvered through the sentencing form, checked the "proper" box, and said the magic words, thereby keeping respondent in its own territory. Yet without the benefit of instant reply, the district court penalized the trial court and assured victory to the respondent.

This court has not previously tolerated such tactics. In Jones, this court specifically rejected a district court interpretation of section 948.01(4)[1] which required the trial court at initial sentencing to impose a total sentence immediately followed by the withholding of a part thereof for use in the event probation is violated. Id. at 25. The court noted 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

[1]§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.

have originally been imposed before the defendant was placed on probation.[2] The 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). Id.

In Holmes, this court overruled that portion of Jones which held that the combined period of incarceration and probation could exceed the statutory maximum, but its holding was consistent with the aforementioned reasoning in Jones. It held:

> (1) that a trial judge is authorized by Section 948.01(4) to sentence a defendant to a period of incarceration followed by a period of probation; (2) that the combined periods at the time of the original sentence cannot exceed the maximum period of incarceration provided by statute for the offense charged; (3) that if probation is subsequently revoked, a trial judge may impose any sentence which he might have originally imposed minus jail time previously served as a part of the sentence; and that (4) no credit shall be given for time spent on probation.

Id. at 383.

Petitoner submits that this is precisely what the trial court did in the instant case. It sentenced respondent to thirty months' incarceration followed by two and one-half years probation. This was within the statutory maximum for respondent's offense, burglary of a structure, a third degree

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[2]The particular language of section 948.06 at issue remains substantially unchanged as (1) of the same statute section. See, Section 948.06(1), Florida Statutes (1981) and (1985).

felony. §§810.02, 775.082(3)(d), Fla. Stat. (1985). When respondent violated his probation, the trial court revoked it and imposed four years incarceration, with credit for time served.

This reasoning is also consistent with the plain language of section 948.06(1), Florida Statutes (1985), which states that upon recovation of probation, "the court shall impose any sentence which it might have originally imposed before placing the probationer on probation." It does not say impose the remainder of that portion of the sentence that was previously withheld. These sections recognize that a "split" sentence is a continuing process, and a process that allows a defendant to control his own destiny, yet at the same time allowing the trial court enough discretion to address all possible contingencies. The district court grievously erred in determining that a term of incarceration merely followed by probation does not constiute a split sentence, and its decision in the instant case should be quashed.

The Future

In summation, petitioner's position, which is consistent with the prior rulings of this court and statutory law, is as follows. The language of section 948.06(1), Florida Statutes (1985) is applicable to split sentence provisions. When a defendant violates his probation, the trial court can revoke that probation and impose any sentence it might have originally imposed before placing the offender on probation. Further, a term of incarceration followed by a period of probation is a split sentence to which the foregoing principles apply, and as

such, it is not necessary that the trial court establish a term of sentence and withhold part of it for later imposition. Should this court determine that double jeopardy prevents the imposition of a "second sentence" following revocation of probation, an offender's acceptance of probation and agreement to abide by its terms should be considered a waiver of those double jeopardy rights.

Unfortunately, the analysis cannot end here, because looming on the horizon and waiting to enter this morass are the sentencing guidelines. Petitioner can visualize the situation involving a defendant who receives a split sentence, where the incarceratiave portion is the guidelines maximum, and after serving that portion his probation is revoked and he is merely recommitted to serve the remainder of the sentence. On the one hand, this disposition would be proper under the district court's reasoning in Poore and the instant case, provided the trial court had used the magic words in imposing the original sentence. On the other hand, petitioner can imagine that this defendant will be heard to complain that the incarcerative portion then exceeds the recommended guidelines range.

Petitioner suggests that the guidelines recognize this situation and provide a method for handling it. Committee Note (d)(12) to Florida Rule of Criminal Procedure 3.701 provides for a split sentence, so long as the incarcerative portion is within the recommended guidelines range and the total sanction does not exceed the term provided by general law. Florida Rule of Criminal Procedure 3.701(d)(14) provides that the sentence

imposed after revocation of probation may be increased to the next higher cell without requiring a reason for departure. Further, this court has recognized that a probationer's behavior during his probation can provide a basis for departure. State v. Pentaude, 500 So.2d 526 (Fla. 1987).

It would only be logical to apply these provisions to an offender who has received a split sentence, as well as to one who has originally been put on probation in lieu of being sentenced. This court has recognized that there is little difference between the two, and further that it was never intended that probation should be a more severe punishment than incarceration. Van Tassel, supra. If these provisions only apply to one who was originally placed on probation, and he violates that probation, he can be sentenced within the recommended guidelines cell, bumped to the next cell, or receive a departure sentence. On the other hand, one who received an "erroneous" split sentence, upon violation of probation, simply walks, while one who received a "proper" split sentence is recommitted for the remainder of the term, and will be heard to complain that his sentence is a guidelines departure.

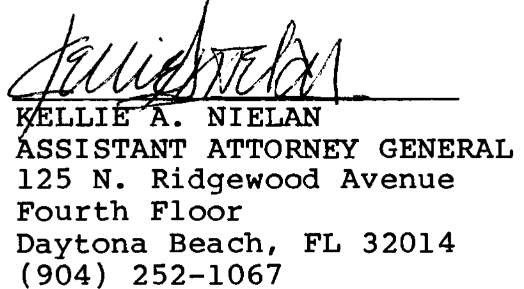
If sentencing schemes are controlled solely by the semantics of split sentences, then surely this court should so state. Petitioner urges this court to provide the trial courts with guidance as to the "proper" method of imposing a "split" sentence, as well as providing guidance for the proper procedure following revocation of probation that was imposed pursuant to a "split" sentence.

CONCLUSION

Based on the arguments an authorities presented herein, petitioner respectfully prays this honorable court reverse the decision of the District Court of Appeal of the State of Florida, Fifth District.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Petitioner's Brief on the Merits has been furnished by mail to: Michael L. O'Neill, Assistant Public Defender, 112 Orange Avenue, Suite A, Daytona Beach, FL 32014, on this 14 day of March, 1988.

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