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IN THE SUPREME COURT OF THE STATE OF FLORIDA

FILED
AUG 1993

STATE OF FLORIDA,

Petitioner,

v. CASE NO. 87-1799

MARK CARR,

Respondent.
_____/

PETITIONER'S BRIEF ON JURISDICTION

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STATEMENT OF THE CASE AND FACTS

Respondent was convicted and sentenced for one count of armed robbery and four counts of burglary of a structure. §§ 812.13(2)(a); 810.02(3), Fla. Stat. (1987) (App. 1,2). The Fifth District Court of Appeal's characterization of that sentence was 40 years in prison with 32 years of that sentence suspended. Thus, respondent was required to serve 8 years actual incarceration (the guidelines range was between 7 and 9 years). The district court went on to explain: "He was also given a total of 20 years probation on top of the 40 years". The district court construed the latter sentence as a true split sentence of 40 year imprisonment, split between 8 years of incarcertion and 32 years of suspended "probation."

The district court went on to uphold the sentence accept to the extent that: "The trial court's attempt to impose an additional 20 years of probation on top of the split sentence is unauthorized and void" (App. 1). The ultimate holding by the district court was to ratify the sentence but to entirely vacate the "additional 20 years of probation" (App. 2).

The state filed a timely motion for rehearing (App. 3-5).[1] The state's motion for rehearing was denied July 20, 1988 (App. 6). Thereafter, petitioner filed a timely notice to invoke this court's discretionary jurisdiction based upon conflict with other

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[1] Respondent also filed a motion for rehearing which was denied. Petitioner's has not set forth that rehearing motion because it is not germain to the issues herein.

cases.

SUMMARY OF ARGUMENT

Carr v. State, 13 F.L.W. 1339 (Fla. 5th DCA June 2, 1988), conflicts with Stafford v. State, 455 So.2d 385 (Fla. 1984), because in the latter case, this court noted that the decision allowed concurrent probation and parole based upon sentences for two separate offenses. As the Carr opinion noted, the respondent was being sentenced for multiple offenses. Thus, under Stafford, it would be permissible to impose a suspended sentence on one count and concurrent probation for separate counts.

Cassidy v. State 464 So.2d 581 (Fla. 2d DCA 1985), held that concurrent sentences cannot be added together for purposes of determining whether the trial court has departed from the guidelines. By vacating the split sentence in the case at bar, the fifth district has held that the sentence is illegal and in violation of the guidelines. Yet, the latter cannot be true whether the sentences pertaining to the supended probation and the actual probation are considered concurrent or consecutive.

Finally, petitioner submits the case at bar is in conflict with Alexander v. State, 422 So.2d 25 (Fla. 2d DCA 1982). In the latter case, the defendant was originally sentenced to an illegal Villery [2] sentence. On remand, the trial court was allowed to impose incarceration in lieu of the probation that was struck from the original sentence. Such an action was upheld. In the case at bar, the trial court, under the authority of Alexander,

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[2] **Villery v. Florida Probation and Parole Commission,** 396 So.2d 1107 (Fla. 1981).

should be allowed to impose the 20 years of actual probation in lieu of all or part of the 40 years suspended probation.

POINT ONE

CARR V. STATE, 13 F.L.W. 1339 (Fla. 5th DCA June 2, 1988), EXPRESSLY AND DIRECTLY CONFLICTS WITH **STAFFORD V. STATE**, 455 So.2d 385 (Fla. 1984).

Petitioner submits that Carr v. State, 13 F.L.W. 1339 (Fla. 5th DCA June 2, 1988), conflicts with Stafford v. State, 455 So.2d 385 (Fla. 1984), because the probation sentences imposed in Carr involved multiple offenses. In Stafford, this court explained that parole and probation were normally not allowed at the same time for one crime. This court explained, however, that such a proposition had no application when there were two separate offenses for which two sentences could be imposed. In the latter circumstances it would be possible to have a prison sentence from which parole may be available, and also have probation imposed based upon another offense. Id. at 387, n.1. In the case at bar, the opinion acknowledges that the maximum sentence for the armed robbery is life and that there were four sentences for burglary, that is, another 20 years could be added to the life sentence. § 812.13(2)(a); 810.02(3), Fla. Stat. (1987).

It is beyond dispute that the trial court does not depart when the total of the incarceration portion of the sentence and the probation sentence does not exceed the term allowed by general sentencing law. Cain v. State, 506 So.2d 1125 (Fla. 1st DCA 1987). Committee Note(d) (12) to Fla. R. Crim. P. 3.701. At set forth in the opinion Carr, there is no departure sentence. Indeed, the opinion itself does not declare the sentence a

departure sentence but only an "unauthorized split-sentence." It was explained in Putt v. State, 13 F.L.W. 1520 (Fla. 3d DCA June 28, 1988), ". . . as long as the term of incarceration falls within the guidelines, the only requirement as to length of probation, is that, in combination with the prison term, did not exceed the sentence set by general law." Even if one adds the suspended part of the probation as well as the 20 years actual probation, the sentence in the case at bar does not exceed the term set by general law, and is allowed under Stafford.

POINT TWO

CARR V. STATE, 13 F.L.W. 1339 (Fla 5th DCA June 2, 1988, EXPRESSLY AND DIRECTLY CONFLICTS WITH **CASSIDY V. STATE**, 464 So.2d 581 (Fla. 2d DCA 1985).

Petitioner submits Carr, supra, conflicts with Cassidy v. State, 464 So.2d 581 (Fla. 2d DCA 1985). The latter case held that concurrent sentences could not be added together for purposes of determining whether a trial court has departed from the guidelines. In Carr, the sentence certainly could be construed as imposing 20 years of actual probation as part of the 40 years suspended part of the probation. As such, the concurrent sentences would not be deemed a departure.

POINT THREE

CARR V. STATE, 13 F.L.W. 1339 (Fla. 5th DCA June 2, 1988), EXPRESSLY AND DIRECTLY CONFLICTS WITH **ALEXANDER V. STATE**, 422 So.2d 25 (Fla. 2d DCA 1982).

Petitioner submits that Carr conflicts with Alexander v. State, 422 So.2d 25 (Fla. 2d DCA 1982). In the latter case, the defendant was originally sentenced to 5 years imprisonment followed by 5 years probation for one offense. Initially, the appellate court reversed the sentence because it violated the statutes and case promulgated pursuant to this court's decision in Villery v. Florida Probation and Parole Commission, 396 So.2d 1107 (Fla. 1981). On remand, the trial court was allowed to reimpose the five years incarceration and to impose additional incarceration in lieu of the probation that had been vacated pursuant to the first appeal. Alexander allowed such a sentence to stand.

Carr, directly and expressly conflicts with Alexander, because it does not give the trial court an opportunity to resentence the respondent in accordance with its original intentions. Even if one assumes for the sake of argument that the sentence is unauthorized as a split-sentence, it does not follow that the 20 years actual probation has to be vacated. If it was the trial court's intention to impose the 20 years actual probation, then the sentence could be vacated under the Carr rationale to allow the trial court an opportunity to reimpose the 20 years of actual probation, either in lieu of or as part of the 32 years suspended probation.

CONCLUSION

Based on the arguments and authorities presented herein, petitioner respectfully prays this honorable court exercise its discretionary jurisdiction in this cause.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing Petitioner's Brief on Jurisidiction has been furnished by mail to James R. Wulchak, Assistant Public Defender, 112 Orange Avenue, Suite A, Daytona Beach, Florida 32014, counsel for the respondent, this 22 day of August, 1988.

W. BRIAN BAYLY
Of counsel