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IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v. CASE NO. 72,926

MARK CARR,

Respondent.
_____/

PETITIONER'S BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

The respondent was convicted and sentenced for one count of armed robbery and four counts of burglary of a structure. Sections 812.13(2)(a); 810.02(3), Fla. Stat. (1987) (App. 1,2). The trial court orally pronounced sentence by saying:

> THE COURT: It is going to be the order of the court in the armed robbery case that you be placed on probation for a term of twenty years.
>
> I'm going to direct that in each of the other cases that you be placed on probation for a term of five years each. I will direct that all of these be concurrent, that is, served at the same time.

(R 7). The court then discussed the conditions of probation including a provision that restitution be made to the victims (R 8).

Then the court stated:

> THE COURT: Okay. I'm going to direct that you begin serving this term of probation after you serve a term of forty years in the Department of Corrections in Case Number CR 87-5018, which is the armed robbery case. I'm going to suspend thirty-two years and direct that you serve eight years.

(R 9).

The trial court's written order for the armed robbery offense stated:

> The Defendant is hereby committed to the custody of the Department of Corrections . . . for a term of 40 years suspend 32 years.

(R 81) (App. 1,2). The judge then checked the first box following this and inserted '20 years' to read:

> Followed by a period of 20 years on probation under the supervision of the Department of Corrections according to the terms and conditions of probation set forth in a separate order entered herein.

(R 81) (App. 1,2).

The Fifth District in Carr v. State, 13 F.L,.W. 1339 (Fla. 5th DCA June 2, 1988), stated: "We construe this sentence as a true split sentence of forty years imprisonment split between eight years incarceration and thirty-two years of suspended probation. The trial court's attempt to impose an additional twenty years of probation on top of this split sentence is unauthorized and void." (App. 7). The district court vacated the 20 years probation, but affirmed the split sentence (App. 8).

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 on Carr being in conflict with Stafford v. State, 455 So.2d 385 (Fla. 1984);

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

Cassidy v. State, 464 So.2d 581 (Fla. 2d DCA 1985); and Alexander v. State, 422 So.2d 25 (Fla. 2d DCA 1982).

Respondent in his brief on jurisdiction disagreed that Carr conflicted with Stafford, but agreed that the district court decision "may conflict' with Cassidy and Alexander. (Respondent's brief on jurisdiction. p. 3).

This court accepted jurisdiction in it's order of October 31, 1988, and scheduled oral argument for February 8, 1989.

SUMMARY OF ARGUMENT

The district court's construction of the sentence imposed by the trial judge is illogical and is flawed by legal infirmities. The district court construed the sentence as a "true split sentence" of forty years confinement with eight years incarceration and thirty-two years "suspended probation". The district court concluded that the trial judge intended twenty years probation to follow the withheld portion of the sentence rather than eight years in prison and therefore vacated the twenty years probation.

Nowhere in the judge's oral or written order does he characterize the thirty-two years as "suspended probation." His sentence was entitled to a presumption of correctness as complying with section 948.01(8), Florida Statutes (1987) governing "true split sentences." That section requires that the probation follow the prison term. His language could be construed as intending that.

Moreover, the sentence as construed by the district court is neither a "true split sentence" or a "probationary split sentence" either under section 948.01(8) or Florida Rule of Criminal Procedure 3.986. Nowhere in either of these provisions is a period of "suspended probation" authorized. Under section 948.01(9), Florida Statutes (1987) in a "true split sentence", the defendant must be placed on probation which is supervised by a public or private entity. This court, as well as others, have disapproved of withholding or staying a sentence and not placing a defendant on **supervised** probation.

Under the district court's construction, the defendant can not be recommitted for the balance of the withheld thirty-two years as permitted because he is on "suspended probation". Nor can the defendant, as in a "probationary split sentence" be resentenced for violation of probation because he is on "suspended probation." The district court's construction reduces the sentence simply to a term of incarceration of eight years which was clearly not the intent of the sentencing judge.

Because of the ambiguities in the sentence and the problems presented by the district court's construction, the proper resolution of this case would be to vacate the entire sentence, and remand it back to the trial court for resentencing consistent with this court's opinion and the trial court's original intentions.

ARGUMENT

WHETHER THE DISTRICT COURT IN **CARR V. STATE,** 13 F.L.W. 1339 (FLA. 5TH DCA JUNE 2, 1988) ERRED IN CONSTRUING THE ORIGINAL SENTENCE AS AN ILLEGAL SPLIT SENTENCE AND IN VACATING THE TWENTY YEARS PROBATION.

The Fifth District in Carr v State, 13 F.L.W. 1339 (Fla. 5th DCA June 2, 1988), construed the lower court's oral statements in pronouncing sentence "as a true split sentence of forty years imprisonment, split between eight years incarceration and thirty-two years "**suspended probation.**" (Emphasis supplied) (See Appendix 7-15). The district court construed that the judge attempted to impose an additional twenty years probation on top of this split sentence. The district court vacated this twenty years probation. The defendant's presumptive guidelines sentence was in the seven to nine year range.

The district court vacated the twenty year probation for the robbery with a firearm offense because it construed the language the judge used at the sentencing hearing as meaning the twenty years probation for this offense was to follow the thirty-two year withheld portion of the sentence. It is the state's position that the judge intended to impose a split sentence pursuant to section 948.01(8), Florida Statutes (1987)[2], with the

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[2] **Florida Statute 948.01(8) (1987),** 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

punishment being imprisonment for 40 years and after the defendant completed eight years, the execution of the 32 year remainder was then to be "stayed" and "withheld" and the defendant placed on probation for 20 years. Under this construction, after the defendant completed the eight years in prison (less gain time), he was to be released from prison on 20 years probation with the implied understanding that if he successfully completed the 20 years probation, he would not have to serve the 32 year remainder of the 40 year sentence; but that if he violated such probation, he would not be resentenced but merely committed to serve the 32 year remainder sentence. In Poore v. State, 13 F.L.W. 571 (Fla. Sept. 22, 1988), the court held the recommittment sentence could not exceed the guidelines. At the time of the trial court's sentencing, this court had not yet decided Poore.

The district court's construction of the trial court's oral pronouncements at sentencing is flawed by legal infirmities which strongly suggests that the trial court intended another construction. The district court's construction is improper for at least four reasons: (1) The judge in his oral pronouncements or written order never referred to the thirty-two years as "suspended probation", (2) Florida Statutes 948.01(9) and caselaw

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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 or community control shall commence immediately upon the release of the defendant from incarceration, whether by parole or gain-time allowances.

make it illegal to place a defendant on probation which is unsupervised or not under the supervision of a public or private entity; (3) courts have interpreted Florida Statute 948.01(8) to mean that a judge may suspend imposition of a sentence only as an incident to probation; and (4) this construction was neither a logical nor legal construction.

The district court construed the thirty-two year suspended sentence as "suspended probation" in order to conform it to the requirements of a split sentence. However, nowhere in either the judge's oral pronouncements or written order, does the judge refer to the 32 year period as "suspended probation." The following makes it clear he intended the 32 years to be a "suspended sentence."

> THE COURT: It is going to be the order of the court in the armed robbery case that you be placed on probation for a term of twenty years.
>
> I'm going to direct that in each of the other cases that you be placed on probation for a term of five years each. I will direct that all of these be concurrent, that is, served at the same time.
>
> * * *
>
> THE COURT: Okay, I'm going to direct that you begin serving this term of probation after you serve a term of forty years in the Department of Corrections in Case Number CR 87-5018, which is the armed robbery case. I'm going to suspend thirty-two years and direct that you serve eight years. (R 7,9)

The judge by saying "you begin serving this term of probation after you serve a term of forty years in the Department of Corrections did not mean that the twenty years probation was to follow the withheld portion of the sentence which was 32 years. By reading the paragraph in its entirety, one could arrive at the equally plausible construction that the judge by suspending 32 years of the 40 year sentence meant the 20 years probation would follow the eight year prison term . The suspended or withheld 32 years imprisonment would only be imposed if the defendant violated this 20 year probation.

The trial judge's sentencing order was entitled to a presumption of correctness by the district court. In construing the oral pronouncement, the presumption is that the judge intended it to comply with the directives of Florida Statutes 948.01(8), pertaining to split sentence. Section 948.01(8), dictates that "The period of probation or community control shall commence immediately upon the release of the defendant from incarceration, whether by parole or gain-time allowances". Therefore, given a choice of ambivalent constructions, it was the responsibility of the district court to construe that the trial court intended the probation to commence immediately upon the release of the defendant from his eight year incarceration and not after the portion of the sentence that was withheld or stayed.

The district court's construction presents a host of problems. The district court's strained construction presents the problem of what is "suspended probation". Does it mean no

probation at all? If so, this neither a 'true split sentence' or even a "probationary split sentence", but rather, a sentence of eight years in prison followed by no probation. If "suspended probation" means unsupervised probation, then it violates section 948.01(9) (1987) which states:

> In no case shall the imposition of sentence be suspended and the defendant thereupon placed on probation or into community control unless such defendant is placed under the custody of the department.

See, Phillips v. State, 455 So.2d 656 (Fla. 5th DCA 1984).

Moreover, this court, as well as other courts, have held that under Chapter 948, withholding a sentence or a portion, thereof, is an indispensable prerequisite to entry of an order placing a defendant on probation. Helton v. State, 106 So.2d 79 (Fla. 1958); Brown v.State, 302 So.2d 430 (Fla. 4th DCA 1974). Yet by the district court's interpretation, the defendant was placed on 32 years suspended probation without the state having the means of implementing any withheld or stayed portion of the sentence.

This is contrary to the provisions of section 948.01(8), requiring that a withheld sentence is to be used as punishment for the violation of probation Nothing in section 948.01(8) authorizing the imposition of "true split sentences" provides for the sentence which the district court has constructed. Section 948.01(8) does not permit "suspended probation", but provides that a withheld sentence be held like the Damocles sword over the defendant to ensure that he does not violate probation. How is that possible with "suspended probation"?

The district court's construction is neither a "true split sentence" nor a "probationary split sentence." For the defendant can neither be recommitted under a "true split sentence" for the remainder of the withheld sentence because he is on "suspended probation", nor can he be brought before the court for violating his subsequent probation, as under a "probationary split sentence", because he is on "suspended probation."

The legal infirmities and confusion presented by the district court's construction provide support for the state's contention that the judge intended the 20 year probation to follow the eight year period of incarceration with the 32 year suspended sentence to be imposed if the defendant violated probations. The state's construction is equally plausible from the judge's language in his oral pronouncement.

The state admits that its construction of the trial court's intentions is contradicted by the court's written order (R 81). Instead of checking the box that indicated a "true split sentence" on the written judgment, the judge checked the one applying to "probationary split sentences" (R 81). However, this in itself is not an indication that the judge intended a construction different than the one the state argues. Judges sometime fail to conform their written orders to their oral pronouncements. Mott v. State, 489 So.2d 854 (Fla. 5th DCA 1986). A trial court's oral pronouncements control over its written orders. Id.

Because of the ambiguities present in the trial court's sentencing order and the ambiguities created by the district

court's construction of his sentence, the state submits the proper resolution of this case would be to vacate the entire sentence and remand to the trial court for resentencing consistent with this court's opinion and the trial court's original sentencing intention.

CONCLUSION

Because of the ambiguities in the sentencing order and the problems presented by the district court's opinion, the state respectfully requests this court to vacate the entire sentence and remand back to the trial court for resentencing consistent with this court's opinion and the trial judge's original sentencing intentions.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing Petitioner's Brief on the Merits and Index to Appendix has been furnished by mail to James R. Wulchak, Chief, Appellate Division, Assistant Public Defender, and counsel for the respondent, at 125 Orange Avenue, Suite A, Daytona Beach, Florida 32014, this 28th day of November, 1988.

Laura Griffin

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