W00A

007

IN THE SUPREME COURT OF FLORIDA

CASE NO. 73,841

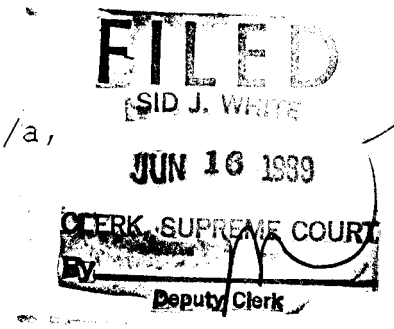
THE STATE OF FLORIDA,

Petitioner,

vs.

JAMES MILES a/k/a,
ERROL BROWN,

Respondent.



ON APPLICATION FOR DISCRETIONARY REVIEW

BRIEF OF RESPONDENT

BENNETT H. BRUMMER
Public Defender
Eleventh Judicial Circuit
of Florida
1351 Northwest 12th Street
Miami, Florida 33125
(305) 545-3005

ELLIOT H. SCHERKER
Assistant Public Defender
Florida Bar No. 202304

Counsel for Respondent.

TABLE OF CONTENTS

TABLE OF CITATIONS

OTHER AUTHORITIES

FLORIDA STATUTES

IN THE SUPREME COURT OF FLORIDA

CASE NO. 73,841

THE STATE OF FLORIDA,

Petitioner,

vs.

JAMES MILES a/k/a,
ERROL BROWN,

Respondent.

ON APPLICATION FOR DISCRETIONARY REVIEW

BRIEF OF RESPONDENT

INTRODUCTION

The respondent, James Miles, was the defendant in the trial court and the appellant in the District Court of Appeal of Florida, Third District. The petitioner, the State of Florida, was the prosecution in the trial court and the appellee in the District Court of Appeal. In this brief, the respondent will be referred to as defendant and the petitioner as the state.

The symbol "R" will be utilized to designate the record on appeal and the symbol "Tr" the transcript of trial proceedings. All emphasis is supplied unless the contrary is indicated.

STATEMENT OF THE CASE AND FACTS

The state's brief accurately sets forth the procedural history of this case and the holding of the court below.

QUESTION PRESENTED

Respondent respectfully restates the question presented on review as follows:

> WHETHER SECTION 958.14, FLORIDA STATUTES (1987), LIMITS SENTENCES IMPOSED UPON A REVOCATION OF YOUTHFUL-OFFENDER COMMUNITY CONTROL TO SIX YEARS OF IMPRISONMENT.

SUMMARY OF ARGUMENT

Section 958.14, Florida Statutes (1987), which became effective on July 1, 1985, expressly limits the sentence that a trial court may impose upon a youthful offender after a revocation of community control to six years or the maximum statutory term, whichever is less. The court below correctly interpreted that statute, using fundamental rules of statutory construction, to mean precisely what it says. This Court's decision in *Poore v. State*, 531 So.2d 161 (Fla. 1988), did not address this issue and the holding therein is wholly inapplicable to the issue presented here. The decision of the court below should be approved and defendant resentenced within the statutory limits.

ARGUMENT

SECTION 958.14 (1987), LIMITS SENTENCES IMPOSED UPON A REVOCATION OF YOUTHFUL-OFFENDER COMMUNITY CONTROL TO SIX YEARS OF IMPRISONMENT.

In imposing sentence upon defendant on March 26, 1985, the trial court classified him as a youthful offender pursuant to Section 958.04, Florida Statutes (1983), and committed him to the Department of Corrections for a period not to exceed six years (R. 28, 58). The court further ordered that "[n]ot more than the first [four years] . . . of said sentence shall be served by imprisonment . . ., and not more than the following [two years] . . . shall be served in a [c]ommunity [c]ontrol [p]rogram." *Ibid.*[1] At the time that these sentences were imposed, Section 958.14, Florida Statutes (1983), provided that "[a] violation or alleged violation of the terms of a community control program shall subject the youthful offender to the provisions of [Section] 948.06(1) [Florida Statutes (1983)]." That statute provided, as it presently does, § 948.06(1), Fla.Stat. (1987), that, upon a revocation of probation or community control, the court is empowered to "impose any sentence which it might have originally imposed before placing the probationer or offender on probation or into community control." § 948.06(1), Fla.Stat. (1983). This Court, interpreting the 1983 youthful-offender statutes, held that these provisions permitted the court "upon revocation of a youthful offender's community control status,

---

[1] Sentence was imposed on a total of four counts in two separate cases, with the court entering sentence on each count, said sentences to be served concurrently (R. 28, 58).

[to] treat the defendant as though it had never placed him in community control and sentence him in accordance with section 948.06(1), Florida Statutes [(1983)]." *Brooks v. State*, 478 So.2d 1052, 1053 (Fla. 1985).[2]

Section 958.14 was amended in the 1985 legislative session, effective July 1, 1985, Ch. 85-288, § 24, Laws of Fla.,[3] to provide as follows:

> A violation or alleged violation of probation or the terms of a community control program shall subject the youthful offender to the provisions of [Section] 948.06(1) [Florida Statutes (1985)]. However, *no youthful offender shall be committed to the department for such violation for a period longer than 6 years or for a period longer than the maximum sentence for the offense for which he was found guilty, which is less*, with credit for time served while incarcerated.

§ 958.14, Fla.Stat. (1985). The current version of the statute is unchanged from the 1985 enactment. § 958.14, Fla.Stat. (1987).

---

[2] Two questions were certified to this Court in *Brooks:* first, whether trial courts had jurisdiction to revoke youthful-offender community-control orders, and second, the issue noted in the text. *Ibid.* While this Court "answer[ed] both questions in the affirmative, the discussion in its opinion is confined to an analysis of the jurisdictional issue presented by the first question. *Id.* at 1053-54. In a series of subsequent decisions, the district courts of appeal held that *Brooks* permitted trial courts to impose any originally-authorized sentence upon a revocation of youthful-offender community control. *Lynch* v. *State*, 491 So.2d 1169, 1170 (Fla. 4th DCA 1986); *Crosby v. State*, 487 So.2d 418 (Fla. 2d DCA 1986); *Hill* v. *State*, 486 So.2d 1372 (Fla. 1st DCA 1986); *Johnson v. State*, 482 So.2d 398, 399 (Fla. 5th DCA 1985).

[3] This Court, in its *Brooks* decision, noted another amendment to the youthful-offender statutes included by the legislature in Chapter 85-288 in the course of its discussion of the jurisdictional issue presented in the case, *Brooks v. State*, 478 So.2d at 1053, but did not touch upon the amendments to Section 958.14.

The court below held that this statute means what it expressly says, and that "the maximum sentence a court may impose after revocation of a youthful-offender's probation or community control is the six-year limitation period of the statute." *Miles* v. *State*, 536 So.2d 262, 263 (Fla. 3d DCA 1988)(citing § 958.14); *accord*, *Cole* v. *State*, 14 F.L.W. 1138 (Fla. 3d DCA May 9, 1989); *Warren* v. *State*, 14 F.L.W. 1039 (Fla. 3d DCA April 25, 1989); *Dixon* v. *State*, 14 F.L.W. 965 (Fla. 3d DCA April 18, 1989); *Hall* v. *State*, 536 So.2d 268 (Fla. 3d DCA 1988). The First and Second Districts have also so interpreted Section 958.14. *Watts* v. *State*, 14 F.L.W. 1014 (Fla. 2d DCA April 21, 1989); *Buckle* v. *State*, 528 So.2d 1285 (Fla. 2d DCA 1988); *Reams* v. *State*, 528 So.2d 558 (Fla. 1st DCA 1988); *Watson* v. *State*, 528 So.2d 101 (Fla. 1st DCA 1988); *Brown* v. *State*, 492 So.2d 822 (Fla. 2d DCA 1986). The Fifth District has held to the contrary in *Franklin* v. *State*, 526 So.2d 159, 163 (Fla. 5th DCA 1988)(en banc), giving rise to the present litigation before this Court.

The decision of the court below is firmly based upon fundamental rules of statutory construction. In its pre-1985 incarnation, Section 958.14 plainly permitted the imposition of *any* lawful sentence upon a revocation of youthful-offender community control, ***Brooks*** v. *State*, 478 So.2d at 1053, and the limitative language added in 1985 must be taken as intended to be of some effect. "In construing legislation, courts should not assume that the legislature acted pointlessly," *Neu* v. *Miami Herald Publishing Company*, 462 So.2d 821, 822 (Fla. 1985) (citation omitted), and "are not to presume that a given statute employs

'useless language."' *Johnson* v. *Feder,* 485 So.2d 409, 411 (Fla. 1986)(citation omitted). "[T]he rule of law is that 'when a statute is amended, it is presumed to have a meaning different from that accorded to it before the amendment." *Reino* v. *State,* 352 So.2d 853, 861 (Fla. 1977)(citation omitted). Thus, "the only logical conclusion is that the legislature intended to change the case law interpretation of § 958.14, or in any event to change the law" by providing that "[a] youthful offender's sentence after revocation of probation community control is . . . limited to a maximum of six years . . . ." *Watson* v. *State,* 528 So.2d at 102. "To assume that the legislature did not mean what the law it enacted says is to assume that the legislature intended to enact a nullity." *Dixon* v. *State,* 14 F.L.W. at 965 (citation omitted).

The rationale of the Fifth District in *Franklin* is simply wrong. The court, after discussing the double jeopardy challenge to the sentence in that case, 526 So.2d at 160-63,[4] addressed Section 958.14 in somewhat offhand manner:

> Although the Youthful Offender Act was amended in 1985 to provide that no youthful offender shall be committed to the department upon a violation of probation for a period longer than six years or the statutory maximum, whichever is less, the amendment does not require a court to reclassify a defendant as a youthful offender after a violation. Accordingly, section 948.06 [Fla.Stat (1987)] may still be applied when the court determines that the defendant should no longer be classified as a youthful offender, allowing the court to sentence a defendant after revocation

---

[4] *Franklin* predates this Court's decision in Poore v. *State,* 531 So.2d 161 (Fla. 1988). See discussion *infra* at page 9.

> to any term which could have been originally imposed without reference to the act.

Id. at 163 (citation omitted).

But this is not what the statute says. Rather, it specifically provides that a "youthful offender" who violates probation or community control shall be subject to Section 948.06, and that no "youthful offender" shall be sentenced "for such violation for a period longer than 6 years . . . ." § 958.14, Fla.Stat. (1987). To accept the Fifth District's construction, one would have to presume that the legislature used "youthful offender" to mean one thing in the first sentence of the statute, and another thing in the second sentence: clearly, the "youthful offender" to whom reference is made in the first sentence is one who is before the court on alleged violation of probation or community control and not one who has been "reclassified" as a youthful offender prior to sentencing upon revocation, yet the Fifth District's interpretation is that the "youthful offender" to whom reference is made in the second sentence of the statute is only one who has been "reclassified." There is nothing in the statute that admits of such a distinction, and, if the legislature had intended "youthful offender" to mean something different in the second sentence, it easily could have provided that the six-year limit applied only when the offender was *reclassified* as a youthful offender. The legislature pointedly did not make such a distinction, and the controlling rule is that "[t]he legislature is presumed to know the meaning of the words it utilizes," *Reino* v. *State*, 352 So.2d at 860, and the courts, "in construing a statute, may not invade the province

of the legislature and add words which change the plain meaning of the statute." ***Metropolitan Dade County v. Bridges,*** 402 So.2d 411, 414 (Fla. 1981)(citation omitted).

The Third District has reached just this conclusion:

> The first sentence of section 958.14 incorporates the procedure stated in section 948.06(1) for revoking the defendant's probation or community control. The second sentence serves to limit the application of section 948.06(1) where a youthful offender is involved by substituting that section's permissible sentence, i.e., any sentence which the court might have originally imposed, for the more limited sentence provided by section 958.14. This court, as well as other district courts, has read the amended statute to require that "once a circuit court has given a defendant youthful offender status and has sentenced him as a youthful offender, it must continue that status and only resentence the defendant as a youthful offender for a violation of the probation or community control portion of his youthful offender sentence."
>
> . . . .
>
> . . . In ***Franklin v. State,*** [citation omitted], the Fifth District Court of Appeal held, without discussion, that "the amendment does not require a court to reclassify a defendant as a youthful offender after a violation." ***Id.*** at 163. We disagree with this reading of the statute. While prior to the 1985 amendment, a youthful offender could be reclassified or resentenced as an adult offender, the clear language of the amended statute now prohibits that.

Dixon v. State, 14 F.L.W. at 965.[5]

---

[5] The state's attempt to breathe vitality into the ***Franklin*** holding by reference to the federal youthful-offender statute, Brief of Petitioner at 12-16, is of no assistance to its case. While this court has noted that the Florida statute is "patterned" after the federal statute (and the Alabama youthful-offender act as well), ***Allen v. State,*** 526 So.2d 69, 70 (Fla. 1988), there is nothing in the provisions of the federal statute cited in the state's brief which parallels the flat limitation imposed by Section 958.14. See Brief of Petitioner at 12-15. To (Cont'd)

The only remaining question is what impact, if any, this Court's decision in *Poore* v. *State*, 531 So.2d 161 (Fla. 1988), has on the issue -- and defendant submits that it has none. The defendant in *Poore* was classified as a youthful offender and sentenced to a total of four and one-half years in the custody of the Department of Corrections, with the trial court directing that he be confined for two and one-half years and serve the remainder of the time on probation with that two-year portion of the term suspended. *Id.* at 162-63. Upon a subsequent revocation of probation, the court imposed a total of four and one-half years of imprisonment, with credit for time served. Id. at 163. The question before this Court was only whether double jeopardy barred the imposition of a new sentence on revocation of probation, *i.e.*, whether the trial court was constitutionally limited on revocation to ordering the defendant to serve the remainder of the original term. There was *no* issue raised before

---

the contrary, it appears that the current federal statutes are virtually identical to the *pre-1985* Florida statute in their adoption of general probation-revocation provisions as part of a youthful-offender sentencing scheme. *See* 18 U.S.C. §§ 5023(a), 3653. While it is certainly true that Florida statutes which are patterned after federal enactments may properly be construed by reference to such enactments and federal decisional law, *e.g.*, Moore v. *State*, 452 So.2d 559, 562 (Fla. 1984), "[t]his rule is, of course, not binding and is subordinate to the cardinal principle that legislative intent is the polestar of statutory construction." *Oppenheimer & Co., Inc.* v. *Young*, 456 So.2d 1175, 1178 (Fla. 1984)(citation omitted). Thus, the current contrast between -- and the former congruity of -- the Florida and federal statutes serves only to prove the correctness of the decision below: the Florida legislature, in first adopting the youthful-offender statute, intended to authorize any lawful sentence upon community-control revocation, and it thereafter departed from the federal model, intending to place a six-year limit on sentences.

this Court as to the applicability or meaning of Section 958.14.[6]

In passing upon the issue presented by the case, this Court first distinguished the five sentencing alternatives available to Florida judges:

> (1) a period of confinement: (2) a "true split sentence" consisting of a total period of confinement with a portion of the confinement period suspending and the defendant placed on probation for that suspended portion: (3) a "probationary split sentence" consisting of a period of confinement, none of which is suspended, followed by a period of probation: (4) a *Villery* [v. *Florida Parole & Probation Commission,* 396 So.2d 1107 (Fla. 1981)] sentence, consisting of a period of probation preceded by a period of confinement imposed a special condition; and (5) straight probation.

Id. at 164. This Court then ruled that, unless "alternative (2) is used as the original sentence," a trial court, upon revocation of probation, may "impose any sentence it originally might have imposed, with credit for time served and subject to the guidelines recommendation." *Ibid.* It is only when the sentencing court chooses to impose a "true split sentence" that "the sentencing judge in no instance may order new incarceration that exceeds the remaining balance of the withheld or suspending portion of the original sentence." *Ibid.* The sentence imposed upon revocation in the case was therefore vacated, with the remainder of the originally-imposed sentence (or the guidelines recommendation, whichever was found to be less) held to be the

---

[6] Presumably, this was because the sentence imposed by the trial court in *Poore* -- four and one-half years of imprisonment -- was *within* the six-year limitation dictated by Section 948.14. This Court thus would have had no occasion to reach the statutory question presented by this case.

maximum term available to the trial court. Id. at 165.[7]

This Court did not address the statutory issue presented by this case in *Poore*. To be sure, the *Franklin* decision was cited with approval in *Poore*, but only to the extent that this Court "agree[d] with the court in *Franklin* that double jeopardy does not forbid the imposition of a longer period of incarceration when a [defendant] violates probation in a probationary split sentence." *Poore* v. *State*, 531 So.2d at 163. Completely absent from this Court's decision is any discussion of the youthful-offender statutes, much less Section 958.14. Thus, as the Third District has concluded,

> *Poore* stands for the proposition that double jeopardy does not forbid the imposition of a longer period of incarceration than that entered in the original sentence when a defendant violates probation in a probationary split sentence.
>
> Nowhere in *Poore* did the supreme court hold that the amended section 958.14 permits a court to "reclassify" a youthful offender as an adult offender upon a probation or community control violation. We decline to find that the supreme court held thus by implication or inference. While it is true that *Poore* concerned a youthful offender who was resentenced outside the confines of the

---

[7] It is perhaps worth noting that *Poore*, independent of Section 958.14, mandates the relief ordered by the court below. The trial court in this case plainly imposed a "true split sentence," ordering a six-year commitment and that "[n]ot more than the first [four years] . . . of said sentence shall be served by imprisonment . . ., and not more than the following [two years] . . . shall be served in a [c]ommunity [c]ontrol [p]rogram." (R. 28, 58). *Poore* defines a "true split sentence" as "consisting of a total period of confinement with a portion of the confinement period suspended and the defendant placed on probation for that suspended portion." *Poore* v. *State*, 531 So.2d at 164. The sentencing option chosen by the trial court in this case exactly fits that definition.

> amended section 958.14, that fact was never placed at issue in that case as it has been in the case before us. Consequently, we do not view *Poore* as authority for the state's proposition. In fact, it is inconceivable that the supreme court could fail to hold as we have here today when confronted with the plain and simple language of the amended Section 958.14.

Dixon v. *State*, 14 F.L.W. at 866.

CONCLUSION

Based on the foregoing, defendant requests this Court to approve the decision of the court below in this cause.

Respectfully submitted,

BENNETT H. BRUMMER
Public Defender
Eleventh Judicial Circuit
of Florida
1351 Northwest 12th Street
(305) 545-3005

BY: _____
ELLIOT H. SCHERKER
Assistant Public Defender
Florida Bar No. 202304

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was forwarded by mail to MICHAEL J.NEIMAND, Assistant Attorney General, 401 N.W. Second Avenue, Suite N921, Miami, Florida 33125 this 14th day of June, 1989.

_____
ELLIOT H. SCHERKER
Assistant Public Defender