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IN THE SUPREME COURT OF FLORIDA

CASE NO. 73,913

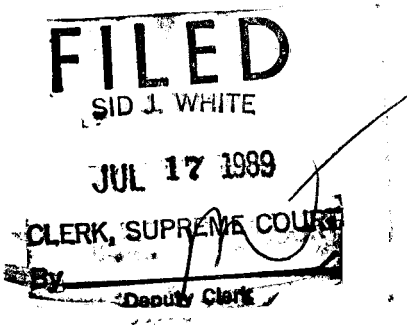
THE STATE OF FLORIDA,

Petitioner,

vs.

ABRAHAM JOHNSON,

Respondent.



ON PETITION FOR DISCRETIONARY REVIEW

BRIEF OF RESPONDENT ON THE MERITS

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INTRODUCTION

The Respondent, ABRAHAM JOHNSON, was the defendant in the trial court and the appellant in the lower court, the Third District Court of Appeal. The Petitioner, the State, was the prosecution in the trial court and the appellee in the Third District. The symbol "R" will refer to the record on appeal, and the symbol "T" will refer to the transcript of proceedings. The abbreviation "App." will refer to the appendix attached to the Respondent's brief.

STATEMENT OF THE CASE AND FACTS

On November 18, 1982, pursuant to entry of a negotiated plea of guilty to a charge of manslaughter, the defendant was sentenced as a youthful offender under Chapter 958, Fla.Stat. to four years imprisonment to be followed by two years community control (R. 14; T. 2-7).

On February 19, 1986, the trial court found the defendant in violation of community control and, over defense counsel's objection that the maximum the trial court could impose under Chapter 958 upon revocation was six years, sentenced the defendant to ten years imprisonment with credit for time served, to be followed by two years probation (T. 50-53; R. 16, 19, 21).

Upon timely appeal, the Third District Court of Appeal reversed the decision of the lower court "on the authority of Miles v. State, 536 So.2d 262 (Fla. 3d DCA 1988)." Johnson v. State, 536 So.2d 270 (Fla. 3d DCA 1989). In Miles, in turn, the Third District had aligned itself with the First and Second Districts in holding that the maximum sentence a court can impose upon revocation of a youthful offender's probation or community control is the six-year limitation period of § 958.14 Fla.Stat. (1987). Miles, 536 So.2d at 263.

This Court accepted jurisdiction of State v. Miles on May 12, 1989 (S.Ct. Case No. 73,841), and of this paired case on June 8, 1989.

SUMMARY OF ARGUMENT

Under the Florida Youthful Offender Act, Chapter 958, Florida Statutes, both pre-1985 and post- 1985 amendment, the trial court could sentence to no greater than six years imprisonment either upon initial sentencing or upon revocation of probation or community control, with credit for time served. This result with respect to initial sentencing is the precise holding of Allen v. State, 526 So.2d 69 (Fla. 1988), and such result with regard to revocation inevitably follows both from Allen and from the federal cases construing the Federal Youth Corrections Act, 18 U.S.C.A. §§ 5005-5020, upon which the Florida act is based.

As an independent matter, because the structure of sentence in the instant case was a six year commitment, the first four years of which was imprisonment to be followed by two years of community control, which is a true split sentence under Poore v. State, 531 So.2d 161 (Fla. 1988), the trial court could not exceed the original sentence (i.e., six years, with credit for time served) on revocation.

ARGUMENT

THE LOWER COURT PROPERLY ALIGNED ITSELF WITH THE GREAT WEIGHT OF AUTHORITY IN FLORIDA CORRECTLY HOLDING THAT UPON REVOCATION OF A YOUTHFUL OFFENDER'S PROBATION OR COMMUNITY CONTROL, THE MAXIMUM ALLOWABLE SENTENCE UNDER CHAPTER 958 IS SIX YEARS IMPRISONMENT WITH CREDIT FOR TIME SERVED.

Although obscured by its brief, the Petitioner has in fact identified, as well as acknowledged at least implicitly, the two fundamental reasons why the lower court was entirely correct in concluding that upon revocation of a youthful offender's probation or community control, the maximum available sentence is six years imprisonment.

The first reason derives from this Court's categorization in Poore v. State, 531 So.2d 161 (Fla. 1988) of the basic sentencing alternatives available to a trial court in Florida. Poore defined its second enumerated alternative therein, 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(.)" Id. at 164. Poore stated in no uncertain terms that where this alternative is used, "the sentencing judge in no instance may order new incarceration that exceeds the remaining balance of the withheld or suspended portion of the original sentence." Id. (emphasis added).

As candidly and significantly conceded by the Petitioner, "Most youthful offender sentences are of the 'true split sentence' type. Therefore, any time a defendant is resentenced for revocation, he can not receive an increased sentence."

(Brief of Petitioner at 11-12). What the Petitioner leaves unspoken in its brief is that such description is precisely characteristic of the sentence imposed in this case. The trial court's original (November 15, 1982) sentencing order provided:

> That [the defendant] is committed to the custody of the DEPARTMENT OF CORRECTIONS ~~for~~ a period not ~~to~~ exceed SIX (6) YEARS(,) and that said commitment shall be served as follows: Not more than the first 4 years ~~of~~ ~~said~~ sentence shall be served by imprisonment in a State Correctional Facility for Youthful Offenders, and not more than the following 2 years shall be served in a Community Control Program(.)"

(R. 14; App. 5) (emphasis added).

Thus, by the explicit acknowledgment of the petitioner, and by the direct mandate of Poore v. State, based on the specific provisions of the sentence originally imposed in this case, i.e., a commitment of six years, with a portion of the commitment period suspended and the defendant placed on community control[1] for the suspended portion, the lower court was eminently correct in concluding that upon revocation the sentence could not exceed six years with credit for time served.

As a distinct matter, independent of Poore categorization, a second fundamental reason why the lower court was correct in its conclusion is that the statutory maximum youthful offender sentence, whether upon initial sentencing or on revocation, is six years imprisonment (with credit for time served).

As Allen v. State, 526 So.2d 69 (Fla. 1988) instructs, and

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[1] For purposes of the Poore categorization, there is no distinction between community control and probation.

as the Petitioner recognizes but incorrectly analyzes, the Florida Youthful Offender Act (§ 958.011-.15, Fla.Stat.) is patterned after the Federal Youth Corrections Act (hereinafter YCA), 18 U.S.C.A. §§ 5005-5020.[2] Section 5010(b), along with its reference provision, § 5017(c), comprised[3] the federal counterpart of former § 958.05(2), Fla.Stat. (1979). Both enactments provide for a maximum commitment of six years to the pertinent custodial authority,[4] with an initial incarcerative portion of commitment of not more than four years, and some portion of the balance of the six years to be served on a probationary basis, in Florida not more than two years, under the YCA, a maximum of the difference between six years and the time incarcerated.

Two primary characteristics of YCA sentencing, which are similarly reflected in the Florida enactment, see §§ 958.021 and 958.11, Fla.Stat., are separation of youth from adult offenders, and individualized treatment. 18 U.S.C.A. § 5011; Ralston v. Robinson, 454 U.S. 201, 206-209, 102 S.Ct. 233, 238-239, 70

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[2] For reference, pertinent statutory provisions have been set forth in the appendix attached to this brief.

[3] Certain sections of the YCA, including § 5010, have since been repealed by Congress. Pub.L.No. 98-473, 98 Stat. 1987, effective October 12, 1984. That repealer does not negate the significance of interpretative caselaw arising under the statute when in effect, nor the applicability of such caselaw in illuminating or clarifying the intent and meaning of the Florida Youthful Offender Act, which was patterned upon the YCA and which remains in effect. Allen v. State, 526 So.2d at 70.

[4] In the instance of the Florida act, the commitment is to be Department of Corrections; under the YCA, the commitment is to the U.S. Attorney General, head of the federal correctional authorities.

L.Ed.2d 345 (1974). These considerations are matters distinct from the applicable limit on length of confinement. While, under the YCA, upon revocation a judge is not limited to recommitting the offender to youth sentence benefits (i.e., individualized treatment and separation from adult offenders), and may sentence to adult conditions of imprisonment (Ralston v. Robinson), the length of recommitment is determined by the YCA provision initially invoked.

United States v. Won Cho, 730 F.2d 1260 (9th Cir. 1984) (en bane) and United States v. Robinson, 770 F.2d 413 (4th Cir. 1985), cert. denied, 474 U.S. 1103 (1986), although disagreeing in interpretation of Ralston v. Robinson as to whether an intervening conviction is required to allow conversion of an existing YCA sentence to an adult sentence (Won Cho holding in the affirmative, Robinson, in the negative), and whether for double jeopardy purposes a conversion to an adult sentence is, on a day-for-day basis, a greater punishment than a YCA sentence (again, Won Cho holding in the affirmative, Robinson in the negative), agree that upon revocation the length of sentence is limited to that established by the initial decision to sentence under § 5010(b) and its reference provision § 5017(c). United States v. Won Cho, 730 F.2d at 1266-1267; United States v. Robinson, 770 F.2d at 415.

That the same holds true under Florida law is apparent both from Allen v. State, and from the structure and terms of Chapter 958. Allen held that a youth sentenced for multiple felonies under the Youthful Offender Act could not be consecutively

sentenced to a total commitment in excess of six years. It thereby necessarily recognized that the statutory maximum imprisonment under the Act is six years. Construing the **1979** (original) version of the Act, in particular repealed § **958.05,** the unanimous Allen court noted that the **1985** amendment[5] (which provided in pertinent part for a maximum six year commitment to the department "notwithstanding any imposition of consecutive sentences") "expressly provides that which we today find implied in its predecessor(.)" Allen, **526** So.2d at **69-70** n. Allen thus effectively determined that the amendment was merely declaratory of the underlying intent of the earlier statute.

The major implication which flows from this is that the corresponding **1985** amendment to § 958.14[6] specifying the identical upper limit on the length of sentence upon revocation, i.e., six years with credit for time served, enacted in the same chapter, is also merely declarative of the underlying legislative intent for the earlier version of the statute. Thus, at all times, pre- and post-amendment, once having classified a defendant as a youthful offender, the trial court could impose no more than six years imprisonment (with credit for time served) whether upon initial sentencing or upon revocation.[7] A second,

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[5] Ch. **85-288,** Laws of Fla., § **27,** effective July 1, **1985,** replacing § 958.05 with new § **958.04.** See Appendix at 1, **2.**

[6] See Appendix at 3.

[7] Thus, in moderate contrast to the position of the respondent in State v. Miles, Case No. **73,841,** that the **1985** amendment changed the law in stating a six year sentence limit on revocation, the respondent herein maintains that the amendment merely clarified the law. The two positions are, of course, (Cont'd)

independent implication is that consistent with the foregoing but distinct as a constitutional matter, the statutory maximum of imprisonment having been set at six years by virtue of invocation of the Youthful Offender Act, Allen v. State, as a double jeopardy consequence the maximum length upon revocation of probation (or community control) must also be six years, with credit for time served. E.g., Poore v. State, 531 So.2d at 164-165.

Brooks v. State, 478 So.2d 1052 (Fla. 1985), although having been so read in some cases, should never have been construed as authority for any contrary conclusion as to permissible length of sentence on revocation. Brooks, insofar as pertinent here, merely answered, without discussion, the following certified question in the affirmative:

> [M]ay the circuit court, upon revocation of a youthful offender's community control program status, 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?

Id., 478 So.2d at 1053.

This response can be reasonably construed as procedural only and not determinative of the applicable limit of length of confinement upon such revocation.[8]

As cogently stated in Bradley v. State, 462 So.2d 24 (Fla.

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consistent in result.

[8] What was upheld in Brooks on revocation was two years imprisonment on each of two counts of armed robbery, 478 So.2d at 1053, which lends no particular support to the cases giving an expansive interpretation. The Brooks opinion does not indicate whether imposition was concurrent or consecutive.

5th DCA 1984), in the context of addressing the question (subsequently settled by Brooks) of whether a trial court rather than the parole commission could revoke community control:

> [S]ection 958.14, which is subsequent in location in the statutes to section 958.10 [footnote omitted], explicitly states that a youthful offender who violates the terms of his community control release shall be subject to the provisions of section 948.06(1) - which explicitly authorizes the court which granted the community control release to revoke it and then to "impose any sentence which it might have originally imposed ..." This can only mean, in this context, that the sentence of imprisonment can be the remaining balance of the original six-year sentence imposed, after consideration of the time actually served.

Id., 462 So.2d at 27 (e.s.).

The expansive interpretation given to Brooks by such cases as Johnson v. State, 482 So.2d 398 (Fla. 5th DCA 1985); Lynch v. State, 491 So.2d 1169 (Fla. 4th DCA 1986), and Crosby v. State, (Crosby (11), 487 So.2d 416 (Fla. 2d DCA 1986), regarding length of sentence on revocation has been dispositively displaced by Allen v. State. Allen reached this court based on certified conflict with Lane v. State, 470 So.2d 30 (Fla. 5th DCA 1985), a pre-amendment youthful offender case which held that on revocation, notwithstanding the availability of consecutive sentences, commitment ~~could not~~ exceed six years with credit for time served. In overruling the district court Allen decision (which rejected Lane) on the issue presented, this court approved Lane. Allen, 526 So.2d at 71.

Thus, whatever question may have existed as to length of sentencing limit on revocation pre-Brooks, or post-Brooks and pre-Allen, has been conclusively settled by Allen and by the 1985

amendment construed in part therein; the limit is six years imprisonment, with credit for time served.

This six-year limitation has been the correct conclusion of the great weight of caselaw since Allen: however, conflicting dictum in Franklin v. State, 526 So.2d 159, 163 (Fla. 5th DCA 1988) (en banc) continues to leave uncertainty in the area. This Court's decision in Franklin, 14 FLW 281 (Fla. June 15, 1989), perhaps because of the limited nature of the briefing in the cause, did not have occasion to go beyond the specific question certified therein. Id.[9] Therefore, this Court should conclusively resolve the matter by declaring Allen and the 1985 amendment to be conclusive on the question of legislative intent and the statutory limit, and in so doing should expressly take the opportunity to disapprove of the erroneous dictum in the Fifth District Franklin decision.

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[9] As recently noted by the Third District in yet another decision recognizing the six-year limitation on revocation: "In Dixon, [Dixon v. State, 14 FLW 965 (Fla. 3d DCA Apr. 18, 1989)], this court certified conflict with the Fifth District Court of Appeal, Franklin v. State, 526 So.2d 159 (Fla. 5th DCA 1988) (en banc). The Florida Supreme Court has answered the certified question posed by Franklin, 14 FLW 281 (Fla. June 15, 1989); however, the supreme court's holding has no effect on the issue on which this court certified conflict." State v. Hicks, 14 FLW 1536, 1537 n. 1 (Fla. 3d DCA June 27, 1989).

CONCLUSION

Based on the foregoing argument and authorities cited, the Respondent respectfully requests this Court to affirm the judgment of the lower court.

Respectfully submitted,

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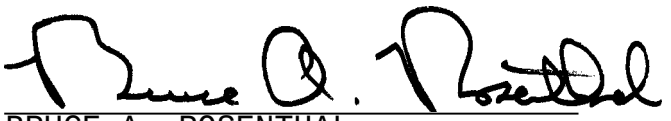
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed to the Office of the Attorney General, 401 Northwest 2nd Avenue, Miami, Florida, this 12th day of July, 1989.



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