

IN THE SUPREME COURT OF FLORIDA

ROGER BRANAM,

PETITIONER,

v.


STATE OF FLORIDA,

RESPONDENT.

FILED
SID J. WHITE

APR 24 1989

CASE NO. 73, CLERK, SUPREME COURT

By 
Deputy Clerk

PETITIONER'S INITIAL BRIEF

✓
HOWARD J. SHIFKE, ESQUIRE
ANTHONY F. GONZALEZ, P. A.
701 N. FRANKLIN STREET
TAMPA, FLORIDA 33602
PHONE: (813) 224-0431
FLORIDA BAR NUMBER 604089

COUNSEL FOR PETITIONER

TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF CITATIONS	ii
PRELIMINARY STATEMENT	iii
STATEMENT OF THE CASE AND FACTS	1
SUMMARY OF THE ARGUMENT	3
ARGUMENT: WHEN THERE ARE MULTIPLE CONVICTIONS AND MAXIMUM SENTENCES WHICH IN THE AGGREGATE ARE LESS THAN CALLED FOR BY THE SENTENCING GUIDELINES SCORESHEET, MUST A TRIAL JUDGE IMPOSE CONSECUTIVE SENTENCES IN ORDER TO BRING THE SENTENCES WITHIN THE GUIDELINES OR AS CLOSE THERETO AS POSSIBLE	
CONCLUSION	7
CERTIFICATE OF SERVICE	8

TABLE OF CITATIONS

	<u>PAGE</u>
<u>Branam v. State</u> 526 So.2d 117 (Fla. 2nd DCA 1988)	1, 4
<u>Fasenmyer v. State</u> 457 So.2d 1361 (Fla. 1984)	5

OTHER AUTHORITIES

Rule 3.701(d)(10), Florida Rules of Criminal Procedure	4
---	---

PRELIMINARY STATEMENT

Petitioner was the Defendant in the trial court and will be referred to as "Petitioner" or "Mr. Branam." Respondent was the State of Florida in the trial court and will be referred to as "the State." The record is contained in one volume, and references to the record will be designated by an "R" followed by the appropriate page number.

STATEMENT OF THE CASE AND FACTS

On October 14, 1986, Mr. Branam was charged in a three-count Information with two counts of sexual battery on a person over the age of twelve and one count of kidnapping. (R.6-7).

In a jury trial ending on February 26, 1987, Mr. Branam was found guilty of a lesser-included sexual battery, an attempted lesser-included sexual battery and false imprisonment. (R.3).

On March 26, 1987, the trial court sentenced Petitioner to five years on each count to run concurrent with each other. (R.3). This was a downward departure from the guidelines supported by written reasons, but the State appealed the sentence.

In an opinion filed by the Second District Court of Appeal on April 13, 1988, the sentence was reversed and the cause remanded for resentencing. (R.10-12). ~~See also~~ Branam v. State, 526 So.2d 117 (Fla. 2nd DCA 1988). The trial court was ordered to resentence Mr. Branam "to the maximum term provided by the applicable statutes." (R.11).

At resentencing, the trial court sentenced Petitioner to the maximum term under each statute, but the trial court ran the sentences consecutively. (R.8).

The trial court expressed that in its discretion, **it** intended to sentence Mr. Branam to thirty years, five years and five years to run concurrently. Instead, the trial court sentenced Petitioner to thirty years, five years and five years consecutively. (R.9).

The trial court expressed a desire to have this issue litigated in the appellate court because of uncertainty in what the resentence should be. (R.9).

Mr. **Branam** took an appeal to the Second District Court of Appeal arguing that the trial court had abused its discretion because the original sentence was to be served concurrently and the resentence was for consecutive time. (Brief of Appellant, Case No. 88-2229, Second District Court of Appeal).

On March 10, 1989, the Second District Court of Appeal affirmed the resentence, but expressed its feeling that this issue on resentencing was a case of first impression. The Second District Court of Appeal certified a question to this Court, and Petitioner is in this Court by way of discretionary review.

SUMMARY OF THE ARGUMENT

Petitioner was originally sentenced to three five-year terms of imprisonment, all to run concurrently. The sentences on the second and third counts at conviction were five years each.

The Second District Court of Appeal reversed the sentences and remanded for resentencing Mr. Branam to the maximum term under the applicable statutes.

The trial court followed the appeals court in sentencing Mr. Branam to the statutory maximums, but ran the sentences consecutively. The trial court expressed a desire to run the sentences concurrently, but felt that the sentences had to run consecutively.

Concurrent sentences for the multiple convictions would not have defeated the purposes of the Florida Rules of Criminal Procedure nor the Florida Statutes, and the trial court should have imposed concurrent sentences on resentencing just as it had on the original sentence.

The certified question should be answered in the negative, and Mr. Branam should be resentenced to the statutory maximum on each count to run concurrently.

ARGUMENT

WHEN THERE ARE MULTIPLE CONVICTIONS AND
MAXIMUM SENTENCES WHICH IN THE AGGREGATE
ARE LESS THEN CALLED FOR BY THE SENTENCING
GUIDELINES SCORESHEET, MUST A TRIAL JUDGE
IMPOSE CONSECUTIVE SENTENCES IN ORDER TO
BRING THE SENTENCES WITHIN THE GUIDELINES
OR AS CLOSE THERETO AS POSSIBLE

On February 26, 1987, Mr. Branam was found guilty of a lesser-included sexual battery, an attempted lesser-included sexual battery and false imprisonment. (R.3). Petitioner was sentenced one month later to three five-year terms of imprisonment to run concurrently. (R.3). On the second and third counts, five years each was the statutory maximum, while thirty years was the statutory maximum on Count One.

The sentence was a downward departure from the sentencing guidelines and the State appealed. On April 13, 1988, the District Court of Appeal reversed the sentence and remanded **it** to the trial court for resentencing. (R.10-12). ~~See also~~ Branam v. State, 526 So.2d 117 (Fla. 2nd DCA 1988).

The appeal court's order states, "the trial court must resentence Branam to the maximum term provided by the applicable statutes." (R.11). The trial court resentedenced Mr. Branam to the maximum term under each statute, but the trial court ran the sentences consecutively. (R.8). Petitioner asserts that the consecutive sentencing was not mandated by the Florida Rules of Criminal Procedure nor the Florida Statutes.

Rule 3.701(d)(10), Florida Rules of Criminal Procedure states:

If the composite score for a defendant charged with a single offense indicates a guideline sentence that exceeds the maximum sentence provided by statute for that offense, the statutory maximum sentence should be imposed.

Fla.R.Cr.P. 3.701(d)(10). In Mr. Branam's case, the guideline sentence exceeded the statutory maximum sentence on all three counts, and the appeals court ordered that Mr. Branam be resentenced to the statutory maximum term under the applicable statutes.

The problem that arises is that Mr. Branam was convicted of three offenses, and not just one. At his original sentencing hearing, Mr. Branam received the statutory maximum sentence on Counts Two and Three, and these were run concurrently with Count One.

Essentially, the appeals court's decision did not affect the second and third counts. Accordingly, Petitioner asserts that the only change at resentencing should have been to resentence him on Count One to the statutory maximum of thirty years. See Fasenmyer v. State, 457 So.2d 1361, 1366 (Fla. 1984) (trial court should not modify, at resentencing, sentences on convictions not disturbed by the appellate court).

Instead, the trial court sentenced Petitioner to the statutory maximum on each count and ran the sentences consecutively.

Since Counts Two and Three were already at their statutory maximum and running concurrently to each other and Count One, the trial court should have given Petitioner the statutory maximum on

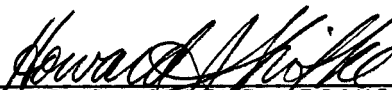
Count One and should not have changed the concurrent status of the sentences.

The Second District Court of Appeal erred when it affirmed the consecutive sentences. This Court should answer the certified question in the negative, and Mr. Branam should be resentenced wherein his sentences of thirty, five and five years would be run concurrently.

CONCLUSION

Based on the foregoing arguments and authorities, Petitioner respectfully requests this Court to answer the certified question in the negative and to reverse his sentence and remand for resentencing.

Respectfully submitted,

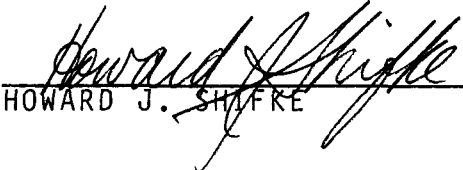


HOWARD J. SHAFKE, ESQUIRE
Anthony F. Gonzalez, P. A.
701 N. Franklin Street
Tampa, Florida 33602
Phone: (813) 224-0431
Florida Bar Number 604089

Counsel for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to William ■. Muncey, Jr., Assistant Attorney General, Park Trammell Building, 1313 Tampa Street, Suite 804, Tampa, Florida 33602, by United States Mail, this 20th day of April, 1989.



HOWARD J. SHIFRE