IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

JOHN A. CARTER,

Respondent.

CASE NO. 74,336

PETITIONER'S BRIEF ON THE MERITS

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INITIAL BRIEF OF PETITIONER

PRELIMINARY STATEMENT

Respondent, John A. Carter, defendant below, will be referred to herein as "Respondent." Petitioner, the State of Florida, will be referred to herein as "the State." References to the record on appeal will be by the symbol "R" followed by the appropriate page number.

STATEMENT OF THE CASE AND FACTS

Pursuant to a conviction for lewd and lascivious assault, Respondent was sentenced in 1985 to five years incarceration followed by ten years probation. After being released from prison in 1987 and while on probation, Respondent was charged with and convicted of battery. At a subsequent revocation hearing, Respondent's probation was revoked and he was sentenced to ten years in prison to be followed by 5 years probation, and given 923 days of credit, representing both the actual time served on the original five year term of incarceration and credit for jail time following his arrest for battery.

Respondent's notice of appeal was filed on April 7, 1988, and the First District Court of Appeal filed its opinion on June 16, 1989 certifying the issue of whether a defendant is entitled to credit for earned gain time where a new sentence is imposed for violation of probation, as one of great public importance. The State's Notice To Invoke Discretionary Review was timely filed on June 16, 1989 and this brief on the merits follows.

SUMMARY OF ARGUMENT

It is the State's position that Respondent is entitled only to credit for time actually spent in jail or in prison. Gain time exists solely to provide well-behaved prisoners with a mechanism for early release. Once such prisoners have been released early as a result of gain time, they have fully and completely received and used the benefits of gain time. Upon any subsequent resentencing for a revocation of probation, these defendants should not be "doubly benefited" by again receiving credit for gain time. Such a use of gain time is not warranted and is contrary to its stated statutory purposes.

ARGUMENT

ISSUE

WHETHER THE TRIAL COURT WAS CORRECT, UPON RESENTENCING RESPONDENT FOR A VIOLATION OF HIS PROBATION, IN ONLY GIVING HIM CREDIT FOR TIME ACTUALLY SPENT IN JAIL OR PRISON.

The trial court properly denied Respondent's credit for accrued gain time upon revocation of his probation. Florida case law indicates that only credit for time served is required upon resentencing for probation revocation, for which the trial court properly credited Respondent. Gain time exists for the sole reason of providing prisoners a mechanism for early release. Once early release has been accomplished, gain time has no further purpose, and thus should not again be awarded to a defendant upon resentencing for probation revocation.

Gain time is "allowed by the state to encourage a prisoner to mend his ways, to conduct himself in an orderly fashion while paying his debt to society and by his conduct to earn the privilege of release earlier than the terminal date fixed by his sentence." Nicholas v. Wainwright, 152 So.2d 458, 461 (Fla. 1963). The stated statutory purpose for awards of gain time is "to encourage satisfactory prison behavior, to provide incentive for prisoners to participate in productive activities, and to reward prisoners who perform outstanding deeds or services." Fla. Stat. §944.275(1) (1988). Thus, gain time is a conditional gift from the state to its prisoners, not a vested right of

prisoners. Prisoners may be released before their sentences actually expire if they comply with prison regulations and perform the labor required to obtain statutory benefits: if they do not perform the labor and behave, they are "permitted" to serve their entire sentences in prison instead of receiving the benefits of early release. Williams v. State, 370 So.2d 1164 (Fla. 4th DCA 1979).

Although gain time is a gift, the statute directs that the Department of Corrections (DOC) "shall" award gain time to those prisoners who obey the rules and perform their work satisfactorily. Fla. Stat. §944.275(4)(a)(1988). A prisoner is "automatically entitled to the monthly gain time simply for avoiding disciplinary infractions and performing his assigned tasks." Weaver v. Graham, 450 U.S. 24, 35 (1981). Thus, if a prisoner can "stay out of trouble," the conditional "gift" of gain time essentially is converted into a conditionally vested right, and the Department of Corrections must award him gain time. See Annotation, Withdrawal, Forfeiture, Modification or Denial of Good-Time Allowance to Prisoners, 95 A.L.R.2d 1276, §6 (1964) (gain time is "not a vested right but is only contingent until such time arrives that its allowance will end imprisonment, that is, until it has been completely earned, and that the right may be forfeited for misconduct or for other cause occurring prior thereto"); Wolff v. McDonnell, 418 U.S. 539, 581 (1974) (acknowledging gain time's conditionally vested right status in

holding that "the interest of inmates in freedom from imposition of serious discipline is a 'liberty' entitled to due process consideration").

As noted, however, this right to accrue gain time "is not absolute but is conditioned upon satisfactory service of the sentence as required by the statute. Nicholas, 152 So.2d at 461. Gain time is "an act of grace rather than a vested right which may be withdrawn, modified, or denied, dependent on the course of conduct of the prisoner." Mayo v. Lukers, 53 So.2d 916, (Fla. 1951). See Harris v. Wainwright, 376 So.2d 855 (Fla. 1979); Dear v. Mayo, 14 So.2d 267 (Fl. 1943), cert. denied, 320 U.S. 766 (1943). See also Kimmons v. Wainwright, 338 So.2d 239, 240 (Fla. 1st DCA 1976), cert. denied, 434 U.S. 843 (1977) ("along with this bonus [of gain time] goes the responsibility of doing nothing that would cause a gain time forfeiture"). See Section 944.28, Florida Statutes (1988) (setting out the grounds and procedures for forfeitures of gain time).

Sub judice, Respondent was sentenced to five years in state prison, to be followed by ten years probation. Respondent served less than three years (or 923 days) in prison due to gain time, and was subsequently released on probation on December 24, 1987. Three days later, on December 27, 1987, Respondent was charged with battery and an affidavit for violation of probation and warrant for arrest were issued. At a revocation hearing held on March 29, 1988, Respondent's probation was revoked and he was

later sentenced to ten years incarceration to be followed by five years probation. He was given 923 days credit, representing both the actual time served on the original five year prison term and jail time served following his arrest for battery. On appeal, the First District has held that Respondent should have been granted full credit for the entire 5-year sentence, including his earned gain time. Carter v. State, 14 FLW 1375 (Fla. 1st DCA June 6, 1989). In effect, Respondent argued for and received a "double-benefit": He accrued gain time on his first sentence and was released early because of gain time; according to the First District, he is now able to use this benefit again for credit against his second sentence. This result is untenable, as gain time is "not intended to reward a criminal for his crimes." Duffy v. State, 730 P.2d 754, 757 (Wyo. 1986).

DOC recognized Respondent's good behavior, granted him gain time, and released him early. Early release is the focus of gain time, and once a prisoner has accrued it and been released early as a result, that gain time has been used and no longer exists. Not crediting Respondent upon resentencing with gain time previously earned and used would not result in the loss of a property right. His right vested, he received the benefit, and he has no further claim to it. After all, "there is a human difference between losing what one has and not getting what one wants." Friendly, Some Kind of Hearing, 123 U.Pa.L.Rev. 1267, 1296 (1975).

Credit for time served is a useful analogy. The constitutional guarantee against "multiple punishments for the same offense absolutely requires that punishment already exacted must be fully 'credited' in imposing sentence upon a new conviction for the same offense." North Carolina v. Pearce, 395 U.S. 711, 718-19 (1969). See State v. Jones, 327 So.2d 18 (Fla. 1976). Thus, a defendant's right to credit for time served "vests" at a resentencing, but only exists for the same offense. Likewise, gain time conditionally vests (subject to forfeiture) upon a defendant's good behavior in prison, but only exists for ~~that one~~ prison sentence and early release.

Beyond this point, the analogy admittedly no longer works, due to the inherent vast differences between and purposes behind credit for time served and gain time. The requirement of credit for time served is a judicial construction created to further the constitutional guarantee against double jeopardy, while gain time is a legislative creation, whose responsibility lies solely within the province of DOC. Hall v. State, 493 So.2d 93 (Fla. 2d DCA 1986); Prangler v. State, 470 So.2d 105 (Fla. 2d DCA 1985); Valdes v. State, 469 So.2d 868 (Fla. 3d DCA 1985). In fact, "the Constitution itself does not guarantee good-time credit for satisfactory behavior while in prison, despite the doubted impact of such credits on the freedom of inmates." Hewitt v. Helms, 459 U.S. 460, 467-68 (1983) (quoting Wolff, 418 U.S. at 557). Thus, it is understandable that these rights are treated differently

and end at different times -- gain time upon early release, and credit for time served upon the commission of a different offense.

The Fifth District in Butler v. State, 530 So.2d 324 (Fla. 5th DCA 1988), recognized these principles. There, the trial court sentenced defendant to four years with DOC, to be followed by two years of community control. Defendant later violated community control and the trial court resentenced him to five and one-half years' imprisonment with credit for time served. On appeal, defendant contended that he was entitled to a full four years' credit on his new sentence despite the fact that he may not have served four years because of gain time. The Fifth District responded:

> There is no merit to this contention. He is entitled to credit only for the actual time spent in jail or prison. State v. Holmes, 360 So.2d 380 (Fla. 1978); Chaitman v. State, 495 So.2d 1231 (Fla. 5th DCA 1986). See also Walker v. State, 506 So.2d 78 (Fla. 1st DCA 1987); Hutchinson v. State, 467 So.2d 788 (Fla. 2d DCA 1985). He is not entitled to credit for time spent on probation or community control, Holmes, and what he requests would produce that result. Petitioner makes no contention that he was not given credit for his actual time in jail or prison so his sentence is AFFIRMED.

Butler, 530 So.2d at 325. Both the Third and Fourth Districts have followed this line of reasoning. See Cole v. State, 14 FLW 1138 (Fla. 3rd DCA May 9, 1989); Dixon v. State, 14 FLW 965 (Fla. 3rd DCA April 18, 1989); Chapman v. State, 14 FLW 516 (Fla. 4th

DCA February 22, 1989). The First District chose to rely on its opinion in Green v. State, 539 So. 2d 484 (Fla. 1st DCA 1989) in reversing the sentence in the instant case, but also noted that Green is presently pending before this Court. State v. Green, Case No. 73,505 (oral argument was held June 6, 1989).

It is the State's position that in Green, the First District erroneously analogized the defendant's revocation of probation to a defendant serving under a void judgment and sentence. See Milligan v. State, 207 So. 2d 24 (Fla. 2d DCA 1968), cert. denied, 212 So.2d 868 (Fla. 1968). Completely different considerations are involved in resentencing after the setting aside of a void judgment and sentence:

> It was not [defendant's] fault that the State's criminal system failed to judge him guilty and sentence him properly in an uninterrupted operation. Under the circumstances of this case it is only fair to give [defendant] full credit for all time he has been in official custody since the time of his first commitment.

Tilghman v. Culver, 99 So.2d 282, 285-86 (Fla. 1957), cert. denied, 356 U.S. 953 (1958). With revocation of probation, however, concerns about what the criminal justice system has done to a defendant are no longer at issue. Rather, a defendant's probation is revoked because of something he has done contrary to the criminal justice system.

The First District also relied heavily upon Stearns v. State, 498 So.2d 982 (Fla. 2d DCA 1986) in reaching its decision in Green. In Stearns, defendant pled guilty to grand theft and received five years on probation. The trial court subsequently revoked his probation and sentenced him to five years in prison. This revocation order was later reversed, and defendant was reinstated on probation. The trial court revoked this second probation and placed defendant on community control. The trial court subsequently revoked the community control, and sentenced defendant to five years with credit for 81 days already served. Defendant also pled guilty to aggravated assault and carrying a concealed firearm and received a concurrent five year sentence. Defendant moved the court for credit for time served, claiming he was entitled to 13 months in prison following the first revocation order, 8½ months of gain time, and six weeks in county jail. The trial court denied this motion, holding that defendant was not entitled to the credit because of his second probation violation.

The Second District found that the trial was laboring under a misconception, and cited to Milligan. Milligan, however, is significant only in its restatement of the general rule that, when a defendant serves under a void judgment and sentence, he should receive credit for time served under that sentence along with any earned gain time. Finding Milligan persuasive, the Stearns court remanded the case for a new sentencing order

"reflecting proper credit for time served and any accrued gain time." 498 So.2d at 984.

In citing Milligan, the Stearns court implicitly followed Pearce, in which the judgments were later set aside. There, the Supreme Court held that credit at resentencing "must, of course, include the time credited during the service of the first prison sentence for good behavior, etc." Pearce, 395 U.S. at 719 n.13. See Tilghman; Perry v. Mayo, 72 So.2d 382 (Fla. 1954); Harvey v. Mayo, 72 So.2d 385 (Fla. 1954), cert. denied, 349 U.S. 965 (1955), reh'g denied, 350 U.S. 856 (1956). Again, the considerations involved upon resentencing after the reversal of a void judgment and sentence are completely different from those involved at resentencing after a defendant violates his probation. When a court fails to properly adjudicate and sentence a defendant, he should not be penalized for an error over which he had no control and should not only be given credit for time served, but gain time as well. But where a defendant violates his probation, he has done something willful and intentional against the criminal justice system, a course of action over which he had full control. See Hines v. State, 358 So.2d 183 (Fla. 1978).

Apparently, the First District in Green found similar between a violation of probation and a void judgment and sentence the fact that the subsequent sentencing is, in essence, a new sentence. When a void judgment and sentence are set aside, "the

original conviction has, at the defendant's behest, been wholly nullified and the slate wiped clean." Pearce, 395 U.S. at 721; Herring v. State, 441 So.2d 966 (Fla. 1982). This is not so with a violation of probation. While a defendant is sentenced anew for his violation of probation, the original conviction still exists.

CONCLUSION

In light of the foregoing argument and citations of authority, Petitioner requests this Honorable Court to quash the decision of the First District and affirm the sentence of the trial court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been forwarded by U.S. Mail to Kathleen Stover, Assistant Public Defender, Post Office Box 671, Tallahassee, Florida, 32302, this 18th day of July, 1989.

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