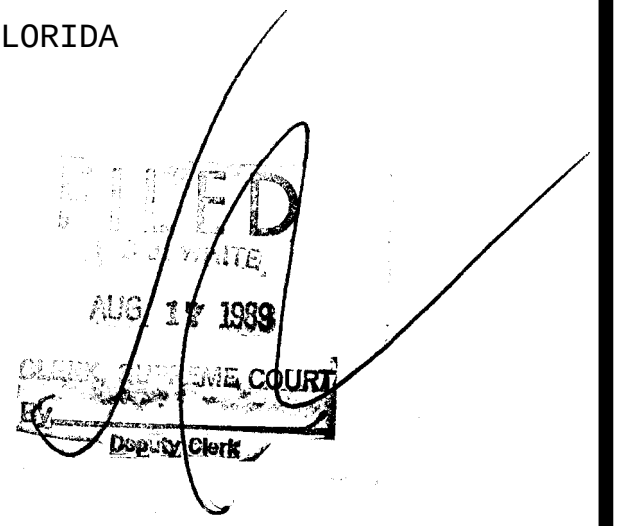
IN THE SUPREME COURT OF FLORIDA

CASE NO. 74,405



ROBERT JAMES,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

****

AN APPEAL FROM THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA
FOURTH DISTRICT

****

RESPONDENT'S BRIEF ON THE MERITS

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LIST OF CITATIONS

OTHER AUTHORITY

PRELIMINARY STATEMENT

Petitioner was the Appellant and Respondent was the Appellee in the Fourth District Court of Appeal. In this brief, the parties will be referred to as they appear before this Honorable Court. A copy of the district court's opinion is attached to this brief as the Appendix.

The following symbols will be used:

"R I"

"R II"

STATEMENT OF THE CASE AND FACTS

Respondent accepts Petitioner's Statement, and makes the following addition:

In computing a guidelines scoresheet, to determine sentence, Petitioner's date of birth was listed as November 13, 1963. (R I, at 22).

Petitioner was ultimately sentenced, upon probation revocation, to nine years (concurrently), in Case No. 87-2762, for robbery, attempted robbery and aggravated battery (R I, 15-16, 19-21), and nine years (concurrently), in Case No. 87-2763, for two counts of robbery. (R 11, 21-28, 34-35).

POINT ON APPEAL

WHETHER THE TRIAL COURT APPROPRIATELY SENTENCED PETITIONER TO NINE YEARS' IMPRISONMENT, SINCE YOUTHFUL OFFENDER ACT WAS RENDERED INAPPLICABLE BY PETITIONER'S AGE, AT TIME OF VIOLATION OF PROBATION?

SUMMARY OF ARGUMENT

The sentence of nine years' imprisonment was appropriate, since Petitioner's age, beyond twenty-one at the time of the probation revocation, placed him beyond the six-year proscription of the youthful offender act, and 8958.14, Fla. Stat. (1985).

Furthermore, notwithstanding Petitioner's age, the District Court did not err in affirming a nine-year sentence which exceeded the maximum penalty authorized by the legislature.

ARGUMENT

THE TRIAL COURT APPROPRIATELY SENTENCED PETITIONER TO NINE YEARS' IMPRISONMENT, SINCE YOUTHFUL OFFENDER ACT WAS RENDERED INAPPLICABLE BY PETITIONER'S AGE, AT TIME OF VIOLATION OF PROBATION.

Petitioner has initially maintained that he was excessively sentenced for his violation of probation, beyond the statutory maximum permissible under the youthful offender act 3958.14, Fla. Stat. (1985). While this view is clearly arguable, Petitioner's age made him ineligible for youthful offender classification, in imposing sentence upon probation revocation herein.

In interpreting the amended version of 8958.14, supra, as referred to in Petitioner's brief, the Fifth District has concluded that a defendant who is originally sentenced as a youthful offender, need not be reclassified as such, upon violation of an original probation or community control period. Franklin v. State, 13 F.L.W. 1269 (Fla. 5th DCA, June 3, 1988). Subsequent decisions, however, have adopted Petitioner's view, and mandated that upon probation revocation, the six-year maximum term of imprisonment provision remains applicable, and proscribes a sentence beyond such a time period. Allen v. State, 13 F.L.W. 375 (Fla. 2nd DCA, July 27, 1988); Reams v. State, 13 F.L.W. 1765 (Fla. 1st DCA, July 27, 1988)(certifying conflict with Franklin, supra, and noting Allen, supra); Watson v. State, 13 F.L.W. 1588,

1589 (Fla. 1st DCA, July 8, 1988)(noting that Franklin reached a different result).

However, the Record, in these consolidated cases, shows that Petitioner was born on November 13, 1963 (R I, 22), and that the acts, giving rise to the revocation of probation occurred from August to December, 1986. (R I, 18A; R 11, at 32-33). In deciding that the 1985 amendments to 8958.14 were applicable to sentencing for revocation of probation, the Second District has observed that, under such circumstances, "... it is the violation of probation which subjects the youthful offender to the provisions of §958.14." Buckle, supra, at 1796. Since Petitioner was over twenty-one years old, at the time he committed the acts, for which his original probation was revoked (Petitioner was 22, or 23, during August to December, 1986), he was ineligible to be sentenced as a youthful offender. §958.04(1)(b), Fla. Stat. (1985); Conner v. State, 422 So.2d 80 (Fla. 2nd DCA 1982). Since Petitioner's sentence was thus not subject to any limitations of the youthful offender act, it was properly imposed. Id.

Assuming that this Court does not accept Respondent's assertion that due to Petitioner's age, the youthful offender act was inapplicable at the time of violation of probation, Respondent maintains that the District Court did not err in affirming the nine-year imprisonment.

Petitioner argues that the Court could not sentence him to a term exceeding six years. Section 958.14 Fla. Stat. (1987); Watson v. State, 528 So.2d 101 (Fla. 1st DCA 1988).

Respondent is mindful of the First District's opinion in Watson, supra, as well as the Second District in Buckle v. State, 528 So.2d 1285 (Fla. 2nd DCA 1988) and the Third District in Miles v. State, 536 So.2d 262 (Fla. 3rd DCA 1988). Respondent asserts that the proper interpretation of the 1985 amendment to §958.14 is in Franklin v. State, 526 So.2d 159 (Fla. 5th DCA 1988). Respondent submits that the legislature's intent was to preclude a longer sentence than six years for someone still possessing the status of youthful offender. Nothing in the amendment suggests that the trial court is required to reclassify the defendant as a youthful offender once he or she has demonstrated an inability to be rehabilitated through that program. Section 958.021 states that the purpose of the act is to provide the trial court with an alternative sentencing scheme less harsh than the adult scheme but more severe than the juvenile scheme. The trial court is to use its discretion when determining whether or not this alternative is applicable to a particular defendant. The intent is to improve the chances for rehabilitation.

Respondent submits that the holding in Watson thwarts that legislative intent. To hold that "once a youthful offender

always a youthful offender" abuses the worthwhile opportunities afforded to juveniles by this act. Once a defendant violates the conditions of his probation, the trial court should then be allowed to determine whether or not this person can still benefit from this program. To limit the Court's discretion in this area by requiring reclassification as a youthful offender violates the intent of the program. Respondent asserts that the amendment is meant to clarify the position that as long as a defendant remains a youthful offender then the six-year cap will apply. Respondent further asserts that if the discretion of the trial court is continually limited in this manner, that courts will be less likely to invoke the youthful offender status when appropriate. This anticipated reaction would certainly sabotage the underlying purposes and value which informed the creation of the youthful offender program.

Appellee submits that Allen v. State, 526 So.2d 69 (Fla. 1988) is not dispositive of this issue. Allen, supra, simply states that multiple felonies may not be sentenced consecutively if the total commitment exceeds the six-year maximum. Nowhere is guidance offered when there has been a violation of that youthful offender sentence. The Court goes on to state that multiple offenses may be sentenced consecutively as long as the defendant is not classified as a youthful offender. Allen, 526 So.2d at 70.

The Court states that the Florida Youthful Offender Act is patterned after the federal act and the Alabama act. Allen, 526 So.2d at 70; United States v. Ortiz, 513 F.2d 198 (9th Cir. 1975); and Ex parte Jackson, 415 So.2d 1169 (Ala. 1980) are in accord with Allen, supra, as both deal with multiple convictions and consecutive sentences. No mention is made of what to do when there has been a violation of probation. Ortiz, supra; Jackson, supra.

Appellee submits that both federal and Alabama courts allow for a reclassification as an adult once there has been a violation of probation. United States v. Condit, 621 F.2d 1096, 1099 (10th Cir. 1980); Dunn v. United States, 561 F.2d 259, 261 (1977); United States v. Robinson, 770 F.2d 413, 415 (4th Cir. 1985); United States v. Won Cho, 730 F.2d 1260, 1270 (9th Cir. 1984); Wright v. State, 349 So.2d 124 (Ala. Crim. App. 1977).

The federal cases cite to the United States Supreme Court case of Ralston v. Robinson, 454 U.S. 201, 70 L.Ed.2d 345, 102 S.Ct 233 (1981). The Court makes it very clear that the federal Youthful Offender Act does not provide for an irrevocable classification. Ralston, 454 U.S. at 211, 70 L.Ed.2d at 355. The Court articulates that subsequent intervening events may prompt a judge to determine that a defendant is not receiving any benefit from the program. Id. The Supreme Court specifically addressed the situation that is in the case sub judice. A defendant on

probation under the Youthful Offender Act violated his probation by committing a subsequent offense. The Court states that the YCA statute permits a judge to now impose an adult sentence for the original crime, the subsequent crime or both. Ralston, 454 U.S. at 216, 70 L.Ed.2d at 358.

Respondent asserts that the Supreme Court's discussion of the "no benefit'' determination is in accord with the policy and intent of its Florida counterpart. As our statute is patterned after the federal and Alabama acts, Respondent submits that a trial judge should not be forced to continue the defendant as a youthful offender once probation has been violated. Our sister district court's interpretation of the 1985 amendment to &958.14 totally undermines the purpose and intent of the act.

If this Court disagrees with Respondent's interpretation of the 1985 amendment, Respondent would request that this Court certify conflict with Franklin, supra.

CONCLUSION

Based upon the foregoing arguments and authorities cited, Respondent respectfully requests this Honorable Court to uphold the lower court's decisions regarding judgment and sentence in all respects.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Respondent's Brief on the Merits has been forwarded, by courier, to MARGARET GOOD, ESQUIRE, Assistant Public Defender, The Governmental Center, 9th Floor, 301 North Olive Avenue, West Palm Beach, FL 33401, this 15th day of August, 1989.

Of Counsel