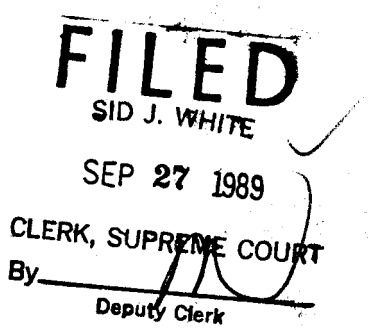
IN THE SUPREME COURT OF FLORIDA

CASE NO. 74,608



THE STATE OF FLORIDA,

Petitioner,

-vs-

HARVEY W. DIXON,

Respondent.

DISCRETIONARY REVIEW, CONFLICT JURISDICTION
FROM THE DISTRICT COURT OF APPEAL,
THIRD DISTRICT

ANSWER BRIEF OF RESPONDENT ON THE MERITS

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INTRODUCTION

This is the answer brief by the defendant Harvey Dixon in this conflict review of the decision of the Third District Court of Appeal reversing the defendant's sentence. The appeal was from a revocation of youthful offender community control following a revocation hearing. Citations to the record are abbreviated as follows:

(R) - Clerk's Record on Appeal

(T) - Transcript of Proceedings

(A) - Appendix attached hereto

STATEMENT OF THE CASE AND FACTS

The defendant accepts the state's Statement of the Case and Facts, with the following additions:

The defendant was charged by information on January 26, 1982, with armed robbery in violation of §812.13(2)(a), Fla. Stat. (1981), and unlawful display of a firearm while engaged in a criminal offense in violation of §790.07(2). (R: 1-2)

On March 31, 1982, the defendant pled guilty to robbery with a firearm and the unlawful display. (R: **15**, 26) On June 10, 1982, the court adjudicated him guilty of both offenses and sentenced him on the robbery pursuant to the Youthful Offender Act, Chapter 958, Fla. Stat. (1981), to six years commitment to the Department of Corrections to be served by four years in prison followed by two years community control. (R: 32-36)[1] The

[1] With respect to count 11, the unlawful possession of a firearm in the commission of a felony, the court suspended sentence. (R: **35**)

written sentence states in pertinent part as follows:

> IT IS FURTHER CONSIDERED, ORDERED AND ADJUDGED that the defendant is hereby classified as a youthful offender under the provisions of Chapter 958 of the Florida Statutes as he meets the criteria of subsections (1) and (2) of the Florida Statute 958.04:
>
> That he 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 FOUR(4) YEARS of said sentence shall be served by imprisonment in a State Correctional Facility for Youthful Offenders, and not more than the following TWO (2) YEARS shall be served in a Community Control Program as defined in Florida Statute 958.03(2). (R: 34)

On February 5, 1987, an affidavit of violation of probation was filed alleging the defendant violated his youthful offender probation by failing to report to his probation officer as required for August, September and October 1986, failing to pay his costs of supervision, and by committing the new offenses of armed robbery, aggravated assault, and grand theft. (R: 46) On May 13, 1987, a second affidavit of violation of probation was filed alleging the defendant committed a second armed robbery offense. (T: 100-106)

A probation violation hearing commenced on May 11, 1987. (T: 1) At the conclusion of the hearing, the court found the defendant violated his community control by failing to report to his probation officer for the months of August, September and October 1986, and by committing the offense of armed robbery. (T: 163-164) On June 10, 1987, the court revoked the defendant's youthful offender community control and sentenced him pursuant to

the sentencing guidelines to eight years in prison on each count to run concurrently. (R: 50; T: 174)

The defendant appealed his sentence to the Third District Court of Appeal and on August 8, 1989, the court issued its opinion reversing the sentence on three separate grounds and requiring that the defendant be given more credit for time served. (A: 1) As the first ground for reversal, the court held that pursuant to §958.14, Fla. Stat. (1987), the maximum sentence a court may impose after a revocation of a youthful offender's probation or community control is six years with credit for time served. (A: 2) The Third District certified conflict on this issue with Franklin v. State, 526 So.2d 159 (Fla. 5th DCA 1988), and this issue is now before this Court on discretionary review.[2]

[2] The other three grounds on which the case was reversed are not now before this Court. Those reasons were: violation of double jeopardy to convict and sentence for both armed robbery and possession of a firearm during that armed robbery, failure to give proper credit for time served, and failure to elect the sentencing guidelines upon resentencing. (A: 1-2)

SUMMARY OF ARGUMENT

The defendant submits the decision of the Third District Court of Appeal is correct and should be approved by this Court. The Third District's opinion holds that the maximum sentence that may be imposed after a revocation of youthful offender probation or community control is six years with credit for time served. Pursuant to the clear and unambiguous provisions of 5958.14 (Fla. Stat. (1987), a defendant found in violation of youthful offender community control must continue to be treated as a youthful offender and sentenced to a maximum of six years in prison or the statutory maximum for the offense, whichever is less (in this case, the six years) with credit for all time served. Moreover, this Court's decision in Poore v. State, 531 So.2d 161 (Fla. 1988), specifically holds that whenever a defendant is sentenced following revocation for a true split sentence, the type of split sentence in this case, the court may not impose an increased sentence beyond the original sentence.

ARGUMENT

THE DECISION OF THE THIRD DISTRICT COURT OF APPEAL CORRECTLY HOLDS THAT THE LOWER COURT ERRED IN RESENTENCING THE DEFENDANT UPON REVOCATION TO EIGHT YEARS WHEN HE WAS ORIGINALLY SENTENCED AS A YOUTHFUL OFFENDER TO SIX YEARS IN THE DEPARTMENT OF CORRECTIONS TO BE SERVED FOUR YEARS INCARCERATION FOLLOWED BY TWO YEARS COMMUNITY CONTROL, AND WHERE THE MAXIMUM PENALTY IS SIX YEARS UNDER §958.14, FLORIDA STATUTES (1987).

The issue in this case concerns the permissible action that may be taken by a trial court upon revocation of a defendant's youthful offender probation or community control under Chapter 958 of the Florida Statutes. Specifically, this case involves a defendant who was sentenced in 1982 pursuant to the Youthful Offender Act, Chapter 958 of the Florida Statutes (1981), to six years commitment to the Department of Corrections to be served four years in prison followed by two years community control, and who, while serving his youthful offender community control following his release from the prison portion of the sentence, violated that community control in 1986 and was then resentenced in 1987 to eight years under the sentencing guidelines.

The resolution of this issue is simple. The Youthful Offender Act, 5958.14, Fla. Stat. (1987), effective July 1, 1985, states in full as follows:

> 958.14 VIOLATION OF PROBATION OR COMMUNITY CONTROL PROGRAM. - A violation or alleged violation of probation or the terms of a community control program shall subject the youthful offender to the provisions of s. 948.06(1). However, no youthful offender shall be committed to the custody of 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, whichever is less, with credit for time served while incarcerated.

Thus, $958.14 expressly provides that upon revocation of youthful offender probation or community control, the defendant may be imprisoned only for a maximum of six years or the maximum statutory sentence for the offense, whichever is less. The effect of this amendment is to require continued youthful offender treatment of a defendant upon revocation of his probation or community control if the defendant had originally been sentenced to the probation or community control under the Youthful Offender Act. In the present case, since the defendant was originally sentenced under the Youthful Offender Act, upon revocation of that youthful offender community control he should still have been treated as a youthful offender and given a youthful offender sentence of six years or less, not resentenced as an adult to eight years in adult prison. (R: 32-36, 50; T: 174) Consequently, the defendant's sentence violates the clear provisions of $958.14 and the Third District's decision reversing the sentence is correct.

The Third District's decision is in accord with the decisions of other district courts of appeal. Haynes v. State, 545 So.2d 949 (Fla. 1st DCA 1989); Reams v. State, 528 So.2d 558 (Fla. 1st DCA 1988); Watson v. State, 528 So.2d 101 (Fla. 1st DCA 1988); Watts v. State, 542 So.2d 425 (Fla. 2d DCA 1989), review granted Case No: 74,117; Boffo v. State, 543 So.2d 435 (Fla. 2d DCA 1989); Buckle v. State, 528 So.2d 1285 (Fla. 2d DCA

1988); Brown v. State, 492 So.2d 822 (Fla. 2d DCA 1986); see also Warren v. State, 542 So.2d 429 (Fla. 3d DCA 1989), review granted Case No: 74,212; Cole v. State, ___ So.2d ___, 14 FLW 1138 (Fla. 3d DCA May 19, 1989), review granted Case No: 74,299; Johnson v. State, 536 So.2d 270 (Fla. 3d DCA 1988), review granted Case No: 73,913; Hall v. State, 536 So.2d 268 (Fla. 3d DCA 1988); Miles v. State, 536 So.2d 262 (Fla. 3d DCA 1988), review granted Case No: 73,841. In all these cases, the courts held that upon violation of the defendant's youthful offender community control, the maximum sentence that may be given the defendant under the amended Chapter 958 is six years imprisonment with credit for time served. As these courts noted, this amended version of 5958.14 is applicable to a defendant who, as the defendant here, although originally sentenced under the Youthful Offender Act prior to the amendment's effective date of July 1, 1985, was later found to be in violation of his youthful offender community control and resentenced after the effective date. In Buckle, the court stated the "amendment is applicable to all violations of probation occurring after its effective date because it is the violation of probation which subjects the youthful offender to the provisions of section 958.14." 528 So.2d at 1286.

However, even if the amendment itself is found not to be applicable to defendants resentenced after the effective date of July 1, 1985, the outcome of this case would be the same. This is because the legislature did not change youthful offender law when it amended §958.14; it merely clarified this aspect of the

law in the face of several court decisions questioning whether a defendant could be resentenced to more than six years in adult prison upon revocation of youthful offender probation or community control. See Brooks v. State, 461 So.2d 995 (Fla. 1st DCA 1984), aff'd 478 So.2d 1052 (Fla. 1985); Clem v. State, 462 So.2d 1134 (Fla. 4th DCA 1984). The previous version of 5958.14 had stated:

> 958.14 VIOLATION OF COMMUNITY CONTROL PROGRAM. - A violation or alleged violation of the terms of a community control program shall subject the youthful offender to the provisions of ss. 948.06(1), 949.10, 949.11, and 949.12.

Although there were a few decisions suggesting this statute permitted resentencing upon youthful offender probation revocation without regard to youthful offender status, see Brooks v. State, supra,[3] most courts had interpreted this to mean that

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[3] It should be noted that this Court's decision in Brooks v. State, 478 So.2d 1052 (Fla. 1985), does not hold that resentencing may take place without regard to S958.14 and the provisions of the Youthful Offender Act, as suggested by the district court cases of Lynch v. State, 491 So.2d 1169 (Fla. 4th DCA 1986); Crosby v. State, 487 So.2d 416 (Fla. 2d DCA 1986); Hill v. State, 486 So.2d 1372 (Fla. 1st DCA 1986), and Johnson v. State, 482 So.2d 398 (Fla. 5th DCA 1985).

The issue decided in Brooks was whether the circuit court had jurisdiction to revoke the community control status of a youthful offender. This Court announced it did. In passing upon that certified question, this Court also summarily answered "in the affirmative" the question whether "the circuit court, upon revocation of a youthful offender's community control program status, [may] 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." This Court did not address the question of the permissible length of sentence or the applicability of 5958.14 upon revocation. Indeed, that question did not arise in Brooks because the defendant in Brooks was resentenced to only two years in prison after an original sentence of six years to be spent four years in prison and two years on community control. Thus, it appears that Brooks was resentenced within the six year cap of 5958.14.

once a defendant had been classified as a youthful offender, the trial court had to resentence the defendant upon revocation of youthful offender probation in accordance with the Youthful Offender Act to a maximum sentence of six years. Lane v. State, 470 So.2d 30 (Fla. 5th DCA 1985); Bradley v. State, 462 So.2d 24 (Fla. 5th DCA 1984); Clem v. State, 462 So.2d 1134 (Fla. 4th DCA 1984); Ellis v. State, 436 So.2d 342 (Fla. 1st DCA 1983).[4]

Strong support for this interpretation of the pre-amendment $958.14 comes from this Court's decision in Allen v. State, 526 So.2d 69 (Fla. 1988). In Allen, this Court held that once a defendant has been classified a youthful offender, the court must adhere to the six year cap established by the legislature in Chapter 958. This Court thus necessarily recognized that the statutory maximum imprisonment under the Youthful Offender Act is six years.[5] This Court further stated that the 1985 amendment to S958.05 (which provided in pertinent part for a maximum six year commitment to the department notwithstanding any imposition of consecutive sentence) "expressly provides that which we today

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[4] The Third District's decision in this case also states that the original S958.14, prior to the 1985 amendment, permitted the court to disregard a defendant's youthful offender status upon resentencing following revocation of youthful offender probation and permitted the court to resentence as an adult. (A: 1-2) The defendant disagrees with the Third District on this point, although this disagreement has no effect on the results of this case.

[5] Indeed, Allen reached this Court based on certified conflict with Lane v. State, 470 So.2d 30 (Fla. 5th DCA 1985), the pre-amendment youthful offender case which held that notwithstanding the availability of consecutive sentences, commitment of a defendant found in violation of youthful offender community control could not exceed six years with credit for time served. Thus, in overruling the district court Allen decision which had rejected Lane, this Court effectively approved Lane.

find implied in its predecessor". Id., at 70. The corresponding 1985 amendment to 5958.14 specifying the identical upper limit on the length of sentence upon revocation is thus also merely declarative of the same underlying legislative intent for the earlier version of the statute. This is found in this Court's reasoning that a commitment of over six years would violate the express intent of the legislature in enacting Chapter 958 to provide a "sentencing alternative" more stringent than the juvenile system but less harsh than the adult system. Id., at 70. As J. Ervin noted in his specially concurring opinion in Reams v. State, 528 So.2d 558 (Fla. 1st DCA 1988), this same legislative purpose of a sentencing alternative would likewise be thwarted by a resentence in excess of the six year cap upon revocation of youthful offender probation. Id., at 559.[6]

And finally, another reason supporting the Third District's decision in this case comes from this Court's decisions in Franklin v. State, 545 So.2d 851 (Fla. 1989), and Poore v. State, 531 So.2d 161 (Fla. 1988), two youthful offender probation violation cases which, however, did not address the applicability of §958.14 to youthful offender revocations. In those two cases, this Court recognized two forms of split sentences: (1) a true split sentence when the judge sentences the defendant to a total

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[6] In addition, this Court in Allen v. State, 526 So.2d 69 (Fla. 1988), noted the Florida Youthful Offender Act was patterned after the federal Youth Corrections Act (YCA) and under the Youth Corrections Act, the length of recommitment upon violation of YCA probation is determined by the YCA provision initially invoked and is limited to that established by the initial sentence. United States v. Robinson, 770 F.2d 413 (4th Cir. 1985); United States v. Won Cho, 730 F.2d 1260 (9th Cir. 1984) (en banc).

specified period of incarceration but suspends a portion of the term and places the defendant on probation or community control during that time, and (2) a probationary split sentence when the judge sentences the defendant to a period of incarceration followed by a period of probation or community control. The sentence in Poore was a true split sentence, as the defendant was sentenced to 4½ years in the Department of Corrections to be served 2f years incarceration and the remainder suspended with the defendant on probation. This Court held that upon revocation of this true split sentence, the sentencing judge may not order new incarceration that exceeds the remaining balance of the suspended portion of the original sentence, which, in Poore, was the 4½ years. Poore v. State, supra at 164. The sentence in Franklin was a probationary split sentence, as the defendant was sentenced to three years in a youthful offender facility to be followed by three years community control. This Court held that upon revocation of this probationary split sentence, the sentencing judge may resentence the defendant to any increased term he might have originally imposed within the permissible statutory and guidelines range. Franklin v. State, supra at 853.[7]

In the present case, the defendant was given a true split sentence. He was specifically committed to the Department of Corrections "for a period not to exceed SIX (6) YEARS". (R:

[7] Although this Court affirmed Franklin's 15 year sentence, this Court did not consider the applicability of S958.14 and the statutory six year cap. Franklin also involved a probationary split sentence whereas the sentence here is a true split sentence, so the Franklin decision does not affect this case.

34) This six year sentence was to be served by four years in prison followed by two years community control. (R: 34) Thus, the judge's sentence contained the maximum "total period of confinement" and under Poore, it was impermissible for the judge to increase that total period of incarceration to eight years upon revocation of probation. Poore v. State, supra at 164.[8]

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[8] The state notes in its initial brief that most youthful sentences are of the true split sentence type. (Petitioner's brief, pg. 10) While this may or may not be so, it is not necessarily so under the provisions of the Youthful Offender Act.

Section 958.04, Fla. Stat. (1987), provides several different sentencing alternatives for youthful offenders. The court may, under subsection (2)(a), place the youthful offender on probation or community control for a period of not more than six years. Under subsection (2)(b), the court may order a period of incarceration of not over 365 days as a special condition of that probation. Under subsection (2)(c), the court may impose a split sentence whereby the defendant is to be placed on probation or community control upon completion of a specified period of incarceration not to exceed four years, with the total time not to exceed six years. And under subsection (2)(d), the court may impose a straight sentence of not more than six years.

Thus, with respect to the split sentence alternative, there is no requirement of either a true split sentence or a probationary split sentence and the lower court is free to fashion the sentence as deemed proper under the circumstances. Of course, the potential for a probation violation and subsequent resentencing would enter into the judge's decision here. As this Court noted in Poore v. State, 531 So.2d 161, 164-165 (Fla. 1988), with respect to the true split sentence, when a judge sentences a defendant to a youthful offender sentence, the possibility of a violation has already been factored into the sentence by the judge and the judge already knows that upon revocation, there will be a six year cap:

> "The possibility of the violation already has been considered, albeit prospectively, when the judge determined the total period of incarceration and suspended a portion of that sentence, during which the defendant would be on probation. In effect, the judge has sentenced in advance for the contingency of a probation violation, and will not later be permitted to change his or her mind on that question." (emphasis in original)

In sum, both pre-amendment and post-amendment law provides that upon violation of youthful offender probation or community control, the defendant is still to be treated as a youthful offender. The defendant's youthful offender probation or community control may be revoked and he may be recommitted to the Department of Corrections for six years or the statutory maximum, whichever is less, with full credit for time served. This ensures, in keeping with the intent of the legislature to fashion a youthful offender disposition that is more lenient than adult sentencing but more stringent than juvenile sentencing, that whatever the original youthful offender sentence might have been, the defendant will ultimately serve a maximum of only six years in prison upon revocation. Consequently, the defendant's sentence of eight years in this case violates the Youthful Offender Act and it was correct for the Third District to reverse the case with directions to resentence the defendant to no more than six years in prison with credit for all time served.

CONCLUSION

Based upon the foregoing, the defendant respectfully requests this Court to approve the decision of the Third District Court of Appeal which reverses his sentence on the armed robbery and remands the case for resentencing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was delivered by mail to the Office of the Attorney General 401 N.W. 2nd Avenue, Miami, Florida this 26th day of September, 1989.

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