9-30

IN THE SUPREME COURT OF FLORIDA

CASE NO. 74,608

THE STATE OF FLORIDA,

Petitioner,

vs.

HARVEY W. DIXON,

Respondent.

****

ON PETITION FOR DISCRETIONARY REVIEW

****

BRIEF OF PETITIONER ON THE MERITS

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INTRODUCTION

The Petitioner, THE STATE OF FLORIDA, was the Appellee in the district court and the prosecution in the trial court. The Respondent, Harvey W. Dixon was the Appellant in the district court and the Defendant in the trial court. The parties will be referred to as they stood before the trial court. The symbol "R" will designate the record on appeal; the symbol "T" will designate the transcript of proceedings; and the symbol "A" will designate the Appendix to this brief.

STATEMENT OF THE CASE AND FACTS

On March 31, 1982, the Defendant pled guilty to robbery with a firearm and unlawful display of a firearm while engaged in a criminal offense. (R. 15, 26-30). On June 10, 1982 he was adjudicated guilty of both offenses and sentenced for robbery with a firearm, pursuant to the Youthful Offender Act, to four years imprisonment followed by two years community control. (R. 32-36). On June 10, 1987, Defendant's community control was revoked and he was sentenced to eight years imprisonment. (R. 50; T. 174).

On appeal in the Third District, Defendant contended that Section 958.14, Florida Statutes (1987) expressly limited the sentence that a trial court may impose upon a youthful offender

after a revocation of community control to six years or the maximum statutory term, whichever is less. Therefore, the eight year sentence imposed after revocation was unlawful and required reversal. (A. 2).

The Third District agreed and reversed for resentencing. (A. 1-2). In *so* doing the Third District aligned itself with the Second District, Buckle v. State, 528 So.2d 1285 (Fla. 2d DCA 1988); Brown v. State, 492 So.2d 822 (Fla. 2d DCA 1986) and the First District, Watson v. State, 528 So.2d 558 (Fla. 1st DCA 1988); Reams v. State, 528 So.2d 558 (Fla. 1st DCA 1988). The instant opinion conflicts with the Fifth District's opinion in Franklin v. State, 526 So.2d 159 (Fla. 5th DCA 1988). (A. 2-5, 7).

In order to insure statewide uniformity of the law in this area, the State sought this Court's discretionary review.

TION RESENTED

WHETHER THE TRIAL COURT ERRED IN SENTENCING DEFENDANT TO A TERM OF IMPRISONMENT IN EXCESS OF SIX YEARS UPON A REVOCATION OF YOUTHFUL-OFFENDER COMMUNITY CONTROL IMPOSED BY SECTION 958.14, FLORIDA STATUTES (1987).

SUMMARY OF THE ARGUMENT

The amendment to Section 958.14, Florida Statutes (1987) does not limit the trial court's discretion on resentencing after revoking a defendant's probation. The position is the only proper interpretation of the legislative intent behind the statute inasmuch as any other interpretation would unduly bridle the trial court's sentencing discretion. This interpretation is supported by the interpretation of analogous provisions of the Federal Youth Corrections Act.

ARGUMENT

THE TRIAL COURT DID NOT ERR IN SENTENCING DEFENDANT TO A TERM OF IMPRISONMENT IN EXCESS OF SIX YEARS UPON A REVOCATION OF YOUTHFUL OFFENDER COMMUNITY CONTROL IMPOSED BY SECTION 958.14, FLORIDA STATUTES (1987)

Prior to its **1985** amendment, Section **958.14,** Florida Statutes simply provided that, upon a revocation of probation or community control, the court could disregard the defendant's youthful offender classification and impose any sentence it might have originally imposed had it not chosen to place the defendant on probation or community control pursuant to Section **958.06(1),** Florida Statutes. In **1985** the statute was amended to provide:

> **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.

Section 958.14, Florida Statutes (1987). (Emphasis denotes amendment to statute).

In the instant case the Third District held that the amendment to the statute meant that the maximum sentence a court may impose after revocation of a youthful offender's probation or community control is the six-year limitation period of the statute. The Court expounded on its holding.

> ... The first sentence of section 958.14 incorporates the procedure stated in section 948.06(1) for revoking the defendant's probation of community control. The second sentence serves to limit the application of section 948.06(1) where a youthful offender is involved by substituting that section's permissible sentence, i.e., any sentence which the court might have originally imposed, for the more limited sentence provided by section 948.14. This court, as well as other district courts, has read the amended statute to require that "once a circuit court has given a defendant youthful offender status and has sentenced him as a youthful offender, it must continue that status and only resentence the defendant as a youthful offender for a violation of the probation or community control portion of his youthful offender sentence." ***Watson v. State,*** 528 So.2d 101, 102 (Fla. 1st DCA 1988); see, ***Hall v. State,*** 536 So.2d 268 (Fla. **3d** DCA 1988); ***Miles v. State,*** 536 So.2d 262 (Fla. 3d DCA 1988); ***Buckle v. State,*** 528 So.2d 1285 (Fla. 2d DCA 1988); ***Reams v. State,*** 528 So.2d 558 (Fla. 1st DCA 1988); ***Brown v. State,*** 492 So.2d 822 (Fla. 2d DCA 1986). Consequently, the maximum sentence a court may impose after a revocation of a youthful offender's probation or community con-

> trol is the statutorily mandated six years with credit for time served.
>
> Nevertheless, the courts are not unanimous in their reading of the amended section 958.14. In ***Franklin v. State***, 526 So.2d 159 (Fla. 5th DCA 1988), the Fifth District Court of Appeal held, without discussion, that "the amendment does not require a court to reclassify a defendant as a youthful offender after a violation." *Id.* at 163. We disagree with this reading of the statute. While prior to the 1985 amendment, a youthful offender could be reclassified or resentenced as an adult offender, the clear language of the amended statute now prohibits that. As the court pointed out in ***Watson***, the legislature amended section 958.14 to limit youthful offenders' sentences upon probation or community control violations as it did shortly after the decisions in ***Brooks v. State***, 461 So.2d 995 (Fla. 1st DCA 1984), 995 (Fla. 1st DCA 1984), *aff'd.*, 478 So.2d 1052 (Fla. 1985) and ***Clem v. State***, 462 So.2d 1234 (Fla. 4th DCA 1984), which held that upon such violations, a youthful offender could be resentenced as an adult. It could thus be said that by this action, the legislature intended to abrogate the case law interpreting section 958.14 or else change the intent of the statute. ***See Watson***, 528 So.2d at 102. To paraphrase the words of Judge Thompson of the First District in ***Watson*** in reference to the amended section 958.14: To assume the legislature did not mean what the law it enacted says is to assume that the legislature intended to enact a nullity. *Id.* at 102.

(A. 2-4) (Footnotes Omitted)

In Franklin v. State, 526 So.2d 159 (Fla. 5th DCA 1988) the court held that the amendment to Section 958.14 gives the

court discretion, upon resentencing, to either find that the defendant is still a viable candidate for youthful offender status or not. If the Defendant is still to be considered a youthful offender, then the six year imprisonment cap still applies. However, if defendant is no longer suitable for youthful offender treatment, then he may be resentenced to any term which could have been originally imposed. Id. at 163. Contrary to the Third District's reading of Franklin, the court therein did provide rationale for its holding:

> In conclusion, we find that a defendant may be sentenced to a term of incarceration to be followed by a period of probation and if the probation is violated after the term of incarceration has been completed, the defendant may nonetheless be resentenced to any term which could have originally been imposed without violating the double jeopardy cause since the resentencing is the result of defendant's subsequent actions.

Id. at 163-164 (Emphasis Added).

Acting Chief Judge, concurring specifically in Watts v. State, 542 So.2d 425 (Fla. 2d DCA 1989), further elucidated on the brief rationale of Franklin:

> I remain doubtful that the legislature clearly stated its intent to cap a defendant's term of imprisonment upon resentencing at six years when he vio-

> lates his community control imposed pursuant to the Youthful Offender Act. Our decision today severely harnesses the discretion of a trial judge at resentencing. One must question any legislative rationale which mandates such a resentencing cap especially in light of the fact that it is not mandatory that the trial judge assign a convicted defendant youthful offender status at the initial sentencing. See, § 958.04, Fla. Stat. (1985) ("the court may sentence as a youthful offender any person" who meets certain criteria, one of which is that he not have been previously classified as a youthful offender) (Emphasis Added); Ch. 80-321, § 1, Laws of Fla.

Id. at 426

The only manner in which this conflict among the district courts can be resolved is to determine the intent behind resentencing after the revocation of probation. The State submits that this Court's decision in Poore v. State, 531 So.2d 161 (Fla. 1988) answers the question and permits, based on the type of original sentence involved, resentencing to any term which might have originally been imposed.

In Poore, this Court addressed the issue of the type of sentence which can be imposed upon resentencing after probation or community control is revoked.

> [2] Thus, we conclude that a judge has five basic sentencing alternatives

> in Florida: (1) a period of confinement; (2) a "true split sentence" 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; (3) a "probationary split sentence" consisting of a period of confinement, none of which is suspended, followed by a period of probation; **(4)** a Villery sentence, consisting of a period of probation preceded by a period of confinement imposed as a special condition; and **(5)** straight probation.

Id. at **164.** This Court held that if a defendant violates his probation in alternatives (3), (4), or **(5),** Section **958.06(1)** permits resentencing to any sentence which might originally have been imposed. This Court also held that if alternative (2) is used a greater sentence than originally imposed impermissible since when the defendant was originally sentenced said sentence was fully imposed but execution was suspended. By imposing the sentence originally, the trial court took into account the possibility of probation revocation and sentenced accordingly. Since no new factors can be taken into consideration upon resentencing for revocation, an increased sentence is impermissible.

The foregoing list of sentencing alternatives is totally consistent with the **958.14,** Florida Statutes **(1987).** Most youthful offender sentences are of the "true split sentence'' type. Therefore, any time a defendant is resentenced for revo-

cation, he cannot receive an increased sentence. However, if a youthful offender is solely given probation, then Poore permits resentencing to any sentence which could have originally been imposed.

Florida's Youthful Offender Act was patterned after the Federal Youth Corrections Act, 18 U.S.C. 5005, et. seq. and support for the State's position is found in analogous provisions of the federal act. Allen v. State, 526 So.2d 79, 80 (Fla. 1988).

The sentencing provisions of the Act, 18 U.S.C. § 5010 are as follows:

> (a) If the court is of the opinion that the youth offender does not need commitment, it may suspend the imposition or execution of sentence and place the youth offender on probation.
>
> (b) If the court shall find that a convicted person is a youth offender, and the offense is punishable by imprisonment under applicable provisions of law other than this subsection, the court may, in lieu of the penalty of imprisonment otherwise provided by law, sentence the youth offender to the custody of the Attorney General for treatment and supervision pursuant to this chapter until discharged by the Division as provided in section 5017(c) of this chapter; or
>
> (c) If the court shall find that the youth offender may not be able to derive maximum benefit from treatment by

> the Division prior to the expiration of six years from the date of conviction it may, in lieu of the penalty of imprisonment otherwise provided by law, sentence the youth offender to the custody of the Attorney General for treatment and supervision pursuant to this chapter for any further period that may be authorized by law for the offense or offenses of which he stands convicted or until discharged by the Division as provided in section 5017(d) of this chapter.
>
> (d) If the court shall find that the youth offender will not derive benefit from treatment under subsection (b) or (c), then the court may sentence the youth offender under any other applicable penalty provision.
>
> (e) If the court desires additional information as to whether a youth offender will derive benefit from treatment under subsection (b) or (c) it may order that he be committed to the custody of the Attorney General for observation and study at an appropriate classification center or agency. Within sixty days from the date of the order, or such additional period as the court may grant, the Division shall report to the court its findings.

The release of youthful offenders committed under 18 **U.S.C. §** 5010 is governed by 18 **U.S.C. §** 5017, which pertinent parts provide:

> (a) The Division may at any time after reasonable notice to the Director release conditionally under supervision a committed youth offender. When, in the judgment of the Director, a committed youth offender should be released conditionally under supervision he shall so report and recommend to the Division.

> (b) The Division may discharge a committed youth offender unconditionally at the expiration of one year from the date of conditional release.
>
> (c) A youth offender committed under section 5014(b) of this chapter shall be released conditionally under supervision on or before the expiration of four years from the date of this conviction and shall be discharged unconditionally on or before six years from the date of his conviction.
>
> (d) A youth offender committed under section 5010(c) of this chapter shall be released conditionally under supervision not later than two years before the expiration of the term imposed by the court. He may be discharged unconditionally at the expiration of not less than one year from the date of his conditional release. He shall be discharged unconditionally on or before the expiration of the maximum sentence imposed, compute uninterruptedly from the date of conviction.

Section 5023(a) states that nothing in the Youth Corrections Act "limit(s) or affect(s)" the court's power "to suspend the imposition or execution of any sentence and place a youthful offender on probation" or in any case "amend(s), repeal(s), or affect(s)" the provisions of the United States Code relating to probation. 18 U.S.C. § 5023(a). By virtue of this section, the Act incorporates the Probation Act. See Ralston v. Robinson, 454 U.S. 201, 215 n. 8, 102 S.Ct. 233, 242 n. 8, 70 L.Ed.2d 354 (1981). The Act gives the courts the authority to require a youth offender to serve a "split sentence," where the youth

could be placed in a facility for a period of up to six months before he is placed on probation. 18 U.S.C. 3651. United States v. Smith, 683 F.2d 1236 (9th Cir. 1982) (en banc), cert. denied, 459 U.S. 1111, 103 S.Ct. 140, 71 L.Ed.2d 962 (1983).

The Probation Act also provides that a probationer may be arrested pursuant to a warrant for violation of probation, or without a warrant by his probation officer for cause. 18 U.S.C. § 3653 (1982). It then provides that:

> speedily as possible after arrest the probationer shall be taken before the court for the district having jurisdiction over him. Thereupon the court may revoke the probation and require him to serve the sentence imposed, or any lesser sentence, and, if imposition of sentence was suspended, may impose any sentence which might originally have been imposed.

18 U.S.C. § 3653.

In accordance with the foregoing sections of the Act, Section 5010(a), permits a court to suspend imposition of the sentence. If this is done, then the probation statute in no way limits its discretion to impose any sentence permitted under the applicable statute. The court at the time of revocation of probation impose any sentence it could have imposed at the time it initially placed the youth offender on probation.

When a sentence has been imposed and execution suspended, section 3653 only empowers a court upon revocation of probation, to require the youth offender to serve the sentence originally imposed, or any lesser sentence. The court may not impose a greater sentence. Ralston v. Robinson, 454 U.S. at 218, n. 10, 102 S.Ct. at 353, n. 10. When a split sentence is imposed then upon a revocation of probation, the court can use this intervening event to convert the youth sentence to an adult sentence. United States v. Robinson, 770 F.2d 413 (4th Cir. 1985).

Based on the review of the analogous provisions of the Federal Youth Corrections Act, the State submits that it is erroneous to assume "[t]he first sentence of section 958.14 incorporates the procedure stated in section 948.06(1) for revoking the defendant's probation or community control. The second sentence serves to limit the application of section 948.06(1) where a youthful offender is involved by substituting that section's permissible sentence, i.e., any sentence which the court might have originally imposed, for the more limited sentence provided by section 948.14." (A. 2-3). Such a reading would clearly be redundant since a youthful offender sentence, based on a "true split sentence," can never be increased. However, all other youthful offender sentences can be increased. The reason therefore, is that at the original sentencing, the trial court did not take into account the possibility of revoca-

tion of probation, and to require resentencing with consideration of the intervening act would unduly restrict the trial court's sentencing discretion.

This Court approved the Fifth District's result in Franklin v. State, **545** So.2d **851** (Fla. **1989).** Although this Court did not specifically address the issue herein, it is clear that this Court was presented with the exact problem as herein. The result in Franklin is consistent with Poore, supra concerning split sentences. Since Franklin concerned a youthful offender revocation and said revocation and increased sentence was upheld, this Court implicitly approved the Fifth District's decision in Franklin.

CONCLUSION

Based on the foregoing points and authorities, the State respectfully requests this Court to quash the Third District's decision in the instant case and reinstate Defendant's sentence.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing BRIEF OF PETITIONER ON THE MERITS was furnished by mail to MARTI ROTHENBERG, Office of the Public Defender, 1351 N.W. 12th Street, Miami, Florida 33125, on this 5 day of September, 1989.

MICHAEL J. NEIMAND

/bf