IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v. Case No. 74,

JAMES KERKLIN,

Respondent.

ON DISCRETIONARY REVIEW FROM THE
SECOND DISTRICT COURT OF APPEAL, STATE OF FLORIDA

BRIEF OF PETITIONER ON THE MERITS

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PRELIMINARY STATEMENT

The State of Florida was the plaintiff in the Circuit Court for the Tenth Judicial Circuit in and for Highlands County, Florida, and was the Appellee in the Second District Court of Appeal. The State is the Petitioner in this Court and will be referred to as "State" or "Petitioner" in this brief. The Respondent, James Kerklin, was the defendant in the trial court and the appellant in the district court. He will be referred to as "Defendant" or "Respondent" in this brief. The opinion of the Second District rendered in this case on July 5, 1989, rehearing denied September 13, 1989, is contained in the Appendix which accompanies this brief.

This case presents the same issue which is presently before this Court in State v. Miles, Case No. 73,841 and State v. Watts, Case No. 74,117.

STATEMENT OF THE CASE AND FACTS

By order dated February 13, 1990, this Court accepted jurisdiction to review the decision of the Second District Court of Appeal rendered in this case on July 5, 1989. *See*, Kerklin v. State, 548 So.2d 689 (Fla. 2d DCA 1989). Respondent had appealed the sentence he received in the trial court upon revocation of his probation. Respondent had originally been sentenced as a youthful offender. Upon revocation of his probation, the trial court, without regard to Section 958.14, Florida Statutes, sentenced him to seven (7) years imprisonment. The Second District opined that a person originally sentenced as a youthful offender must be given youthful offender treatment upon revocation of his probation and/or community control. Thus, respondent sentence of seven (7) years was reversed with directions to impose a sentence pursuant to Section 958.14, including the appropriate credit for all time served.

Respondent was charged by information filed on May 3, 1985 with one count of a lewd act upon or in the presence of a child and three counts of contributing to the delinquency of a minor. After pleas of guilty, he was adjudicated guilty on all counts and sentenced on January 9, 1986 as a youthful offender on count I to three years imprisonment followed by two years probation, with credit for 127 days served. He was sentenced on the other counts to time served.

After serving sixteen (16) months, respondent was released. Thereafter on July 23, 1987, an affidavit for violation of

probation was filed, and a second affidavit was filed in December, 1987. Respondent admitted the violations and was sentenced on December 22, 1987, to seven (7) years.

SUMMARY OF THE ARGUMENT

The amendment to Section **958.14,** Florida Statutes, does not limit the trial court's discretion on resentencing a youthful offender upon revocation of his probation and/or community control. This Court said as much in the decision of Franklin v. State, **545** So.2d **851** (Fla. **1989). A** defendant originally sentenced as a youthful offender may upon revocation of his probation/community control be sentenced to any period of incarceration permitted by the guidelines up to a one-cell increase. This resentence would also be subject to any other valid reasons for departing from the guidelines.

ARGUMENT

THE TRIAL COURT DID NOT ERR IN SENTENCING PETITIONER TO A TERM OF IMPRISONMENT IN EXCESS OF SIX YEARS UPON REVOCATION OF A TERM OF PROBATION IMPOSED PURSUANT TO THE YOUTHFUL OFFENDER STATUTE, SECTION 958.14, FLORIDA STATUTES

The Second District Court of Appeal in Kerklin v. State, 548 So.2d 689 (Fla. 2d DCA 1989), took the position that a criminal defendant who was sentenced as a youthful offender under Section 958.14, Florida Statutes, must upon revocation of probation and/or community control be resentenced pursuant to that statute. The Fifth District in Franklin v. State, 526 So.2d 159 (Fla. 5th DCA 1988)(*Franklin I*), took the position that the amendment to the statute did not require resentencing as a youthful offender. That court held that a youthful offender upon revocation of probation and/or community control could be sentenced under the guidelines without reference to the youthful offender statute.

Petitioner submits this issue was resolved in the State's favor by this Court in Franklin v. State, 545 So.2d 851 (Fla. 1989)(*Franklin II*). The district court in *Franklin I* certified the following question to this Court:

> HAVING SENTENCED A DEFENDANT TO A TERM OF INCARCERATION FOLLOWED BY PROBATION OR COMMUNITY CONTROL, MAY THE COURT AFTER A VIOLATION OF THE PROBATION OR COMMUNITY CONTROL, IMPOSE ANY SENTENCE WHICH COULD HAVE BEEN ORIGINALLY IMPOSED WITH CREDIT FOR TIME SERVED AND MUST SUCH SENTENCE BE WITHIN THE GUIDELINE RANGE UNLESS VALID REASONS FOR DEPARTURE ARE GIVEN

Although the certified question was worded without regard to the original sentence having been imposed under the youthful offender

act, it is clear from the facts of that case that the defendant was originally sentenced pursuant to Section **958.14,** Florida Statutes. The district court's opinion begins with a recitation of the facts including, *inter alia,* the fact that the defendant was sentenced as a youthful offender in **1983** to two concurrent terms in a youthful offender facility to be followed by three years community control. Franklin v. State, **526** So.2d at **160, 163.**

This Court answered the certified question in the affirmative and held that upon revocation of probation a trial court may resentence the defendant to any term falling within the original guidelines range, including a one-cell upward increase. Franklin v. State, **545** So.2d at **853.**

Petitioner is aware that the youthful offender statute, Section **958.14,** as amended in **1985** (effective July **1, 1985),** provides for a maximum period of incarceration of six **(6)** years upon revocation of probation or community control. However, petitioner submits this amendment to the statute is not applicable in this situation since the defendant committed the crime prior to the enactment of the amendment to Section **958.14.** Respondent committed the lewd act in the presence of a child on May **6, 1985;** Section **958.14** was amended effective July 1, **1985.** In keeping with Article **10,** Section **9,** Florida Constitution, the amendment of a criminal statute should not be applied to crimes committed prior to the change. *See,* Castle v. State, **330** So.2d **10** (Fla. **1976)** and State v. Pizarro, **383** So.2d **762** (Fla. 4th **DCA 1980).** Prior to the **1985** amendment, the youthful offender statute allowed for a sentence upon revocation of probation or

community control to be any sentence within the statutory maximum or the sentencing guidelines.

Even if the amendment to the statute is applicable to this case, Petitioner submits that statutory amendment does not preclude the seven (7) year sentence imposed here. Section **958.14,** provides:

> **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.

This statute should be interpreted to give meaning to all of its terms and provisions.

The first sentence of the provision provides for treatment under Section **948.06(1),** Florida Statutes, upon revocation of probation and community control. One of the provisions of that subsection is the imposition of any sentence that could have originally be given once revocation has taken place. In order to give meaning to the second portion of Section **958.14,** it should be interpreted as being applicable to revocation proceedings where the court has again indicated that youthful offender treatment should be given. ***Sub*** *judice,* the trial court specifically indicated that this was not a youthful offender sentence but was a sentence under the guidelines.

Additionally, as was argued in State v. Miles, Case No. 73,841, the holding in *Franklin II* is supported by this Court's decision of Poore v. State, 531 So.2d 161 (Fla. 1988), which was cited with approval in *Franklin II*. This Court in both Poore and Franklin indicated that under the "probationary split sentence" a period of probation preceded by a period of confinement, none of which is suspended, a defendant can upon revocation be sentenced to any term he could have originally received.

The defendant in this case was sentenced as a youthful offender to a period of incarceration followed by probation. An affidavit of violation of that probation was filed. The trial court determined the respondent should be sentenced under the guidelines and not to youthful offender treatment. The trial court had discretion to do so; the seven (7) year sentence should be affirmed. Franklin v. State, *supra.*

CONCLUSION

The opinion of the Second District of Court of Appeal requiring youthful offender resentencing upon revocation of probation when the original sentencing was under youthful offender is erroneous and should be reversed. A trial court should be free to resentence upon revocation given under the youthful offender statute to any sentence which could have originally been given consistent with the decisions from this Court in Poore and Franklin.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the Brief of the Petitioner on the Merits and a copy of the Appendix has been furnished by U.S. Mail to Kevin Briggs, Assistant Public Defender, Polk County Courthouse, P.O. Box 9000-Drawer PD, Bartow, Florida 33830, this 12th day of March, 1990.

Of Counsel for Petitioner