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IN THE SUPREME COURT OF FLORIDA

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STATE OF FLORIDA,

Petitioner,

v.

Case No.: 74,812

PATRICK ALLEN YOUNG,

Respondent.

PETITIONER'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner, the State of Florida, the prosecuting authority in the trial court and appellee below, will be referred to in this brief as the state. Respondent, Patrick Allen Young, the defendant in the trial court and appellant below, will be referred to in this brief as respondent. References to the record on appeal will be noted by the symbol "R"; references to the transcript of the sentencing hearing will be noted by the symbol "T"; and references to the appendix attached to the answer brief of the state will be noted by the symbol "SA." All references will be followed by the appropriate page number(s) in parentheses.

STATEMENT OF THE CASE AND FACTS

Respondent's prior record (SA 5) resulted in his being committed to the Department of Health and Rehabilitative Services and placed at Arthur G. Dozier School for Boys, "a major institution, the most restrictive and punitive program the Department has" (SA 5). After serving 90 days in this program, the Department released respondent, placing him on aftercare, a postcommitment program (SA 5). Respondent's aftercare consisted of his having to report to the Department once a week for the first 30 days and to perform any sanctions ordered by the court (T 13). Respondent only reported for his first visit (T 13), and by committing the instant offenses, violated his aftercare sanctions (SA 5).

In case number 87-3062-CF, the state charged respondent with grand theft of a motor vehicle and burglary: in case number 87-3063-CF, the state charged respondent with the same charges, which applied to a different motor vehicle. Respondent pled guilty to grand theft in both cases (SA 3; R 23-24). At sentencing, the prosecutor argued that respondent's status on juvenile aftercare status qualified as "legal constraint," such that another six points should be added should be added in calculating petitioner's scoresheet (T 12). Defense counsel objected on the grounds that juvenile aftercare did not constitute an adult constraint (T 12). The trial court agreed with the state's position and included the additional six points (T 13-14; R 37).

Respondent timely appealed his sentence to the First District Court of Appeal (R 41). That court reversed the trial court's scoring of juvenile aftercare as legal constraint, relying on its decision in Ellison v. State, 547 So.2d 1003 (Fla. 1st DCA 1989). Pursuant to Fla. R. App. P. 9.030(a)(2)(A)(iv), the First District certified that its decision expressly conflicted with Butler v. State, 543 So.2d 432 (Fla. 2d DCA 1989) on the same question on law.

The state timely filed its notice to invoke this Court's discretionary jurisdiction, and this brief on the merits follows.

SUMMARY OF THE ARGUMENT

The trial court properly scored respondent's juvenile aftercare status as legal constraint under Fla. R. Crim. P. 3.701(d)(6). Because respondent was on the juvenile equivalent of adult community control at the time he committed the instant offenses, the trial court correctly assessed six points for legal constraint.

ARGUMENT

ISSUE

WHETHER THE TRIAL COURT PROPERLY SCORED
RESPONDENT'S JUVENILE AFTERCARE STATUS AS
LEGAL CONSTRAINT UNDER FLA. R. CRIM. P.
3.701(d)(6).

The trial court properly scored respondent's juvenile aftercare status as legal constraint under Fla. R. Crim. P. 3.071(d)(6). Aftercare is the juvenile equivalent of adult community control, and because the rule does not distinguish between juvenile and adult sanctions, the scoring of six additional points in the instant case was eminently appropriate.

The First District premised its holding in this case on its recent decision in Ellison v. State, 547 So.2d 1003 (Fla. 1st DCA 1989), which is presently pending before this Court on a similar issue. The Ellison court resolved the legal constraint issue solely on the legal principle of "expressio unius est exclusio alterius," or the inclusion of one thing implies the exclusion of another. Thus, because Rule 3.701(d)(6) did not expressly include furlough status, that court held that points for legal constraint could not be assessed for that status, and certified its conflict with Butler v. State, 543 So.2d 432 (Fla. 2d DCA 1989). In the instant matter, the First District discerned no difference between furlough and aftercare, and thus ruled in concert with Ellison.

However, in Butler, the Second District did not mention the principle of "expressio unius." Instead, that court examined the furlough status for indicia of legal constraint. Specifically, that court noted that furlough was the equivalent of community control, because furlough involved the "'release of a child, pursuant to an executed conditional agreement, from a treatment program of the Department to supervision in the community.'" 543 So.2d at 433 (citation omitted). That court also observed that Rule 3.701(d) (6) did not distinguish between adult and juvenile sanctions, citing to Espinosa v. State, 496 So.2d 236, 237 n.1 (Fla. 3d DCA 1986).

The Butler court distinguished Hannah v. State, 480 So.2d 718 (Fla. 4th DCA 1986), upon which the Ellison court relied. In Hannah, the defendant was placed on furlough from a group home, the conditions of which required him to report in periodically. After a month, the defendant stopped reporting, at which time he was placed on absconder status. This status was later changed to inactive. Because no explanation of the defendant's "inactive status" had ever been provided to the trial or appellate court, the Fourth District found that the trial court erred in assessing points for legal constraint. Despite the Ellison court's contention to the contrary, the Hannah court did not hold that "point for legal status at the time of offense may not be assessed for an offender on 'furlough status.'" Ellison, 547 So.2d at 1007.

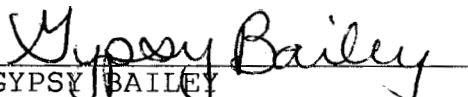
Admittedly, juvenile aftercare is not specifically enumerated under Rule 3.701(d)(6). The rule specifically mentions only parole, probation, community control, and pretrial intervention and diversion programs. However, it is clear that respondent remained in the custody of the Department even after he stopped reporting; he was not placed on absconder or inactive status, and had not been released from aftercare. Aftercare is simply a conditional release from a center/home designated by the Department, "a kind of consecutive probation in the juvenile system" (T 11). Compare Fla. Stat. 5394.479 (1987) (aftercare in the mental health context is defined as the care, treatment, and services provided to a patient on convalescent status or conditional release). Because respondent was on the juvenile equivalent of adult community control at the time he committed the instant offenses, the trial court correctly scored points for legal constraint.

CONCLUSION

Based on the above cited legal authorities and arguments, the state respectfully requests this Honorable Court to affirm the trial court's scoring of respondent's juvenile aftercare status as legal constraint under Fla. R. Crim. P. 3.701(d)(6), and to reverse the decision of the First District Court of Appeal.

Respectfully submitted,

ROBERT A. BUTTERWORTH
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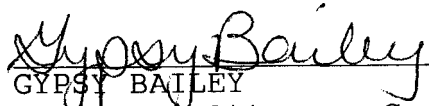
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been forwarded by U.S. Mail to Lawrence Korn, Assistant Public Defender, Leon County Courthouse, Fourth Floor North, 301 South Monroe Street, Tallahassee, Florida 32301, this 14th day of November, 1989.



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