IN THE SUPREME COURT OF FLORIDA

MICHAEL GLASS,

Petitioner,

v. CASE NO. 75,600

STATE OF FLORIDA,

Respondent.

_____/

BRIEF OF PETITIONER ON THE MERITS

BARBARA M. LINTHICUM
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

MICHAEL J. MINERVA
ASSISTANT PUBLIC DEFENDER
FLORIDA BAR #92487
LEON COUNTY COURTHOUSE
FOURTH FLOOR, NORTH
301 SOUTH MONROE STREET
TALLAHASSEE, FLORIDA 32301
(904) 488-2458

ATTORNEY FOR PETITIONER

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BRIEF OF PETITIONER ON THE MERITS

PRELIMINARY STATEMENT

Petitioner, MICHAEL GLASS, was the defendant in the trial court and the appellant in the district court of appeal.

References to the record will be designated "R"; to the transcript of the plea as "TP"; and to the transcript of the sentencing as "TS".

The opinion of the district court is included in the appendix, and references to pages in the appendix will be designated "App".

STATEMENT OF THE CASE AND FACTS

Petitioner was on probation for five counts of uttering a forged instrument. An affidavit charging him with violating probation was filed in the circuit court of Bay County and petitioner admitted the violations. (R 18-19; TP 2-5)

The guideline scoresheet prepared for sentencing placed petitioner in the category of any non-state prison. (R 25) The trial judge sentenced petitioner to 30 months incarceration, followed by five years probation on each count, all to run concurrently. (R 38-48; TS 6-8).

Petitioner appealed to the first district court of appeal on two grounds; (1) the total sanction of 30 months incarceration followed by five years probation exceeded the statutory maximum of five years for a third degree felony and, (2) the imposition of incarceration, none of which was suspended, followed by straight probation, violated double jeopardy because it was not a disposition authorized by the legislature.

The district court agreed that the total sanction of 7 1/2 years was beyond the statutory maximum and remanded "for sentencing within the statutory limitations." (App. 2-3)

On the second point, questioning the validity of the so-called probationary split sentence, the court affirmed on the basis of this Court's opinion in Poore v. State, 531 So.2d 161 (Fla. 1988) but said:

> Glass further contends that the split sentence imposed violates his constitutional protection against double jeopardy because no statute authorizes a split sentence by which a period of

> incarceration is followed by a period of probation with none of the incarceration withheld. We note that from the face of the opinion in Poore v. State, 531 So.2d 161 (Fla. 1988), it does not clearly appear that all of the arguments made by Glass were presented to and considered by the court in Poore. However, the opinion in Poore is so pervasive on the issue of split sentences as to leave us no latitude to vacate the sentence as not being one of the alternatives expressly authorized in section 921.187, Florida Statutes. See Carter v. State, 552 So.2d 203 (Fla. 1st DCA) (Judges Barfield and Zehmer, specially concurring), aff'd, 553 So.2d 169 (Fla. 1989).

The district court certified the following question of great public importance, which is now before this Court:

> DOES A DOUBLE JEOPARDY VIOLATION RESULT FROM THE IMPOSITION OF A PROBATIONARY SPLIT SENTENCE WHEN THE LEGISLATURE HAS NOT EXPLICITLY AUTHORIZED THAT DISPOSITION IN THE SENTENCING ALTERNATIVES OF SECTION 921.187, FLORIDA STATUTES?

SUMMARY OF THE ARGUMENT

In Poore v. State, 531 So.2d 161 (Fla. 1988) this Court approved a sentencing alternative called a probationary split sentence, which is a period of probation following a sentence of incarceration even when a portion of the sentence was not withheld. That case did not require a decision on the issue raised here, which is that the legislature did not authorize a probationary split sentence and therefore the court could not create it.

The Double Jeopardy Clauses of the state and federal constitutions prohibit courts from imposing more punishment than the legislature authorizes. The legislature has the exclusive authority to determine punishment for categories of crimes. The courts do not. The Florida Legislature has not authorized the courts to impose both incarceration and probation for a single offense unless the judge withholds a portion of the incarcerative portion of the sentence.

Appellant was sentenced to incarceration followed by probation in the same case without a portion of the incarcerative sentence being withheld. Imposition of the probationary term in this case is a disposition which the legislature did not authorize. The unauthorized probation therefore constituted a violation of appellant's rights against double jeopardy.

ARGUMENT

ISSUE PRESENTED

WHETHER A PROBATIONARY SPLIT SENTENCE VIOLATES DOUBLE JEOPARDY BY ALLOWING COURTS TO IMPOSE A DISPOSITIONAL ALTERNATIVE NOT AUTHORIZED BY THE LEGISLATURE.

The Fifth Amendment to the United States Constitution states that no person shall be "subject for the same offense to be twice put in jeopardy of life or limb." Similarly, Article I, Section 9 of the Florida Constitution says that no person shall be "twice put in jeopardy for the same offense."

One of the protections afforded by the Double Jeopardy Clauses of both constitutions is against "multiple punishments for the same offense." North Carolina v. Pearce, 395 U.S. 711, 717 (1969;) Jones v. Thomas, __U.S.__, 105 L.Ed.2d 322 (1989); Carawan v. State, 515 So.2d 161, 163-164 (Fla. 1987). This court recently reiterated that, with respect to cumulative sentences from a single trial, the Double Jeopardy Clause prevents "the sentencing court from prescribing greater punishment than the legislature intended." State v. Smith, 547 So.2d 613, 615 (Fla. 1989), quoting Missouri v. Hunter, 459 U.S. 359, 366 (1983).

The power to establish penalties for crimes rests exclusively with the legislature. Smith v. State, 537 So.2d 982 (Fla. 1989); Beynard v. Wainwright, 322 So.2d 473 (Fla. 1975); State v. Garcia, 229 So.2d 236, 238 (Fla. 1969); Wilson v. State, 225 So.2d 321 (Fla. 1969); Brown v. State, 13 So.2d 458 (Fla. 1943). Conversely, the courts have no power to determine

the extent of punishment for a category of offense; the task of courts is to apply the sentencing statutes prescribed by the legislature. Smith v. State, supra, 537 So.2d at 986 (holding invalid the original version of the sentencing guidelines rules because they limited the length of sentences and were, therefore, substantive in nature and thus beyond the authority of the supreme court to enact).

Those principles apply to the probation imposed here. Authority for a probationary split sentence must be contained in a legislative enactment. In Section 921.187, Florida Statutes (1987) the legislature authorized courts to impose combinations of punitive sanctions in these ways:

> (1) The following alternatives for the disposition of criminal cases shall be used in a manner which will best serve the needs of society, which will punish criminal offenders, and which will provide the opportunity for rehabilitation. A court may:
> (a) Place an offender on probation with or without an adjudication of guilt pursuant to s. 948.01.
> (b) Impose a fine and probation pursuant to s. 948.011...
> (c) Place a felony offender into community control...pursuant to chapter 948.
> (d) Impose, as a condition of probation or community control, a period of treatment which shall be restricted to either a county facility, a Department of Corrections probation and restitution center, or a community residential or nonresidential facility ... Placement in such a facility may not exceed 364 days.
> (e) Sentence an offender pursuant to s. 922.051 to imprisonment in a county jail ... [for] not more than 364 days.
> (f) Sentence an offender who is to be punished by imprisonment in a county jail to a jail in another county if there is no jail within the county suitable ... pursuant to s. 950.01.
> (g) Impose a split sentence whereby the offender

> is to be placed on probation upon completion of any specified period of such sentence, which period may include a term of years or less. (Emphasis Added.)
>
> * * *
>
> (k) Sentence an offender to imprisonment in a state correctional institution.

Paragraph (g) defines a true split sentence. The mechanism for imposing that sentence is described in Section 948.01(8), Florida Statutes (1987):

> Whenever punishment by imprisonment for a misdemeanor or a felony, except for a capital felony, is prescribed, the court, in its discretion, may, at the time of sentencing, impose a split sentence whereby the defendant is to be placed on probation ... upon completion of any specified period of such sentence which may include a term of years or less. In such case, the court shall stay and withhold the imposition of the remainder of sentence ... (Emphasis Added)

No statute authorizes what was imposed here, a sentence of incarceration followed by probation with none of the incarceration withheld.

A comparison of the statute and the sentence/ probation ordered in this case reveals that petitioner was given two separate punishments when the legislature authorized only one. That is, the legislature allowed the courts to impose prison, or probation, or jail as a condition of probation, or a combination of prison and probation when a specific portion of the incarcerative term is withheld. It did not, however, authorize both straight incarceration and probation in the same case.

Nevertheless, in Poore v. State, 531 So.2d 161 (Fla. 1988), this court set out five sentencing alternatives:

> 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 period of probation preceded by period of confinement imposed as a special condition;
>
> 5) straight probation.

Id. at 164.

Admittedly, the kind of sentence petitioner received is authorized in Poore under alternative (3), the "probationary split sentence." One searches the statutes in vain, however, for legislative authorization to impose the separate sanctions of straight prison followed by straight probation. There being no legislative grant of authority to dispose of a single case with both of those sanctions, the imposition of prison and probation in this case violated double jeopardy under the United States Constitution and the Florida Constitution.

The double jeopardy problems of the probationary split sentence are substantial. Imposing both a sentence and probation when only one disposition is approved is no different than imposing both imprisonment and a fine when the legislature made them mutually exclusive punishments. Dual punishments in those

circumstances violate double jeopardy under the United States Constitution. Ex Parte Lange, 18 Wall. 163 (1874); In re Bradley, 318 U.S. 50 (1943).

Closer to home, this court ruled in Ex Parte Bosso, 41 So.2d 322 (Fla. 1949) that when the legislature specified the punishment to be either a fine or imprisonment, the trial court lacked the authority to impose a fine and probation because "it is unlawful for a court to inflict two punishments for the same offense...." Id. at 323.

The double jeopardy decisions are inconsistent with the portion of Poore approving the probationary split sentence alternative. This court apparently was not presented with the double jeopardy arguments raised now when deciding Poore and should reconsider its ruling.[1]

In Poore, this court cited only the judgment and sentence form, Rule 3.986, Florida Rules of Criminal Procedure, as authority for the probationary split sentence. Disagreeing with Judge Cowart that only one kind of split sentence existed in Florida, the court approved Franklin v. State, 526 So.2d 159, 162-163 (Fla. 5th DCA 1988)(en banc), approved, 545 So.2d 851, (Fla. 1989) which said:

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[1]In Poore the court had enough to concern itself with already. The court faced the intertwined nightmares of resentencing a youthful offender following violation of the probationary portion of a split sentence, on which was superimposed the issue of electing to be resentenced under the guidelines, enacted between the original and subsequent sentencing proceedings.

> Rule 3.986, rather than being an error, was in fact a clarification of the two separate split sentence alternatives available to the courts. While a judge may clearly withhold a portion of a term of imprisonment and place a defendant on probation for the withheld portion with the understanding that upon revocation of probation, the withheld portion of the sentence will reactivate, this is not the only possible sentencing alternative. In such circumstances, a judge is limited to merely recommitting the defendant to the balance of the preset term of incarceration upon a violation of probation. However, in sentencing a defendant to incarceration followed by probation, the court is limited only by the guidelines and the statutory maximum in punishing a defendant after a violation of probation.

Poore, supra, 531 So.2d at 164.

Rule 3.986 does not cure the constitutional defect. This court, not the legislature, created the judgment and sentence form relied on in Poore when it enacted Rule 3.986 in 1981. In re Florida Rules of Criminal Procedure, 408 So.2d 207 (Fla. 1981).[2] If the court's rule, without legislative authorization, is the basis for the probationary split sentence, any disposition springing from the rule should fail as the consequence of an invalid attempt by the court to enact substantive rather than procedural changes.

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[2]Prior to its enactment by the court via a mere form, the probationary split sentence existed, if at all, by virtue of the court's opinion in State v. Jones, 327 So.2d 18 (Fla. 1976). Ironically the portion of Jones allowing the court to impose any sentence it could have originally after violation of the probationary portion of a true split sentence was partially overruled in Poore sub silencio, just as the court had expressly overruled another portion of Jones in Villery v. Florida Parole and Probation Comm., 396 So.2d 1107 (Fla. 1981).

In Smith v. State, supra, 537 So.2d 982, the court held that the ranges of the sentencing guidelines were substantive law requiring legislative enactment; the court's procedural rules were ineffective until enacted into law by the legislature. The same reasoning applies to the probationary split sentence. It is substantive law not enacted by the legislature. The court could not bootstrap the probationary split sentence into existence in Poore by citing a procedural rule when promulgation of the rule was itself beyond the court's authority.

In separate concurring opinions in Carter v. State, 552 So.2d 203 (Fla. 1st DCA 1989), approved, 553 So.2d 169 (Fla. 1989), Judges Barfield and Zehmer accurately identify some problems with the "probationary split sentence" alternative approved by Poore. The concurrences also accurately identify the genesis of these problems, which is that the probationary split sentence is not an approved sentencing alternative under any applicable statute. See sec. 921.187, Fla.Stat.

Noting that Poore is binding on the district court, Judge Zehmer pointed out that "we are not free to find any double jeopardy problems with the imposition of sentence in this case." Carter, supra, 552 So.2d at 205. Nevertheless, he said:

> As Judge Barfield has pointed out in his concurring opinion, section 921.187, Florida Statutes, sets forth the statutory authority for the disposition and sentencing alternatives available in criminal cases, yet the supreme court's opinion in Poore makes no mention of this statute in

> characterizing the five sentencing alternatives available to the courts.

Ibid. Judge Zehmer continued:

> Nothing in section 921.187 authorizes the court to sentence an offender to imprisonment for a specified term and, after completing service of the full term of imprisonment, to serve an additional period of probation. The only statutorily authorized basis for imposing a so-called "split sentence" is set forth in subsection 921.187(1)(g), which specifies a "true split sentence" as defined in category 2 of the Poore decision ("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").

Ibid.. Finally, the judge concluded:

> Therefore, like Judge Barfield, I question the validity of appellant's original sentence under the statute in view of the failure of the opinion in Poore even to mention this important section of the statute. Perhaps the supreme court can more fully explicate the statutory authority for the category 3 "probationary split sentence" alternative described in Poore when properly afforded the opportunity for doing so in an appropriate case.

Ibid.

In light of the decision in Lambert v. State, 545 So.2d 838 (Fla. 1989), limiting the extent of departure to one cell above the guideline range upon a violation of probation, this court may legitimately wonder what difference there is between a probationary split sentence and a true split sentence. That is, assuming a probation violation can never result in a sentence greater than a one cell increase, is this not simply an academic discourse with no real practical effect?

Regardless of the practical effect, petitioner has been given an illegal sentence. Lambert, moreover, might be revised later, either by this Court or the legislature. That has already happened to some extent.

With the advent of habitual offender sentences under the revised habitual offender statute, section 775.084, Fla. Stat. (1989), the limitations of the guidelines no longer apply to habitual offenders. The strictures of Lambert do not, therefore, apply to habitual offenders given probationary split sentences. Thus, a person given a probationary split sentence under the new habitual offender statute potentially could now be sentenced on a probation violation to any sentence that could have been imposed originally, subject only to credit for time previously served. That result contrasts with the limitations imposed by Poore on the period of incarceration following violation of the probationary portion of a true split sentence. Poore held that the trial judge is limited to imposing the withheld portion of the split sentence.

In Poore, supra, 531 So.2d at 164-65 the court explained the concept that limits the trial judge when the probationary portion of a true split sentence is violated:

> 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.)

Those limits were intended by the legislature to apply to all split sentences. The legislature did not expressly authorize any other disposition for a violation of probation following a sentence. The unrestricted prison sentence following violation of probation which this Court approved in Poore is a punishment neither enacted nor intended by the legislature.

Without the limitation of the withheld portion, judges will have only the statutory maximum as the limitation on the sentence which could be imposed for violating probation. That, in effect, allows the judge to sentence a probation violator as if violation of probation were a new crime, rather than reincarceration after a failed attempted at rehabilitation for an old crime. Allowing that would run counter to the principle, recognized in Lambert, that "violation of probation is not itself an independent offense punishable at law in Florida." 543 So.2d at 841.

Failure to recognize the limitations following violation of probation as envisioned in a true split sentence has led the courts to a never ending treadmill of prison followed by probation, followed by a violation, followed by prison again, followed by a new term of probation, followed again by probation, ad infinitum. That is another vice of the probationary split sentence, the possibility of endless rounds of probation violations, not found in a true split sentence.

The legislature did not authorize the courts to dole out sentences in fragments. That is why the statutes provide for only one kind of split sentence; the kind in which the court

decides at the outset what the maximum term of incarceration for the crime should be, and then allows the court to give the defendant a chance to mitigate that punishment while being rehabilitated on probation. If the defendant does not avail himself of that opportunity, he is then to be remanded to serve the remainder of what was originally thought to be the proper punishment for the crime. Absent that limitation trial judges would be permitted to treat each probation violation as a new crime instead of a failure at rehabilitation.

Of course, if a defendant has been convicted of more that one offense, the court may sentence for some offenses and impose probation for others. If probation is violated the court may then impose an appropriate sentence for the probated offenses, because the defendant had originally been placed on straight probation. But without legislative authorization the courts cannot add straight probation to a term of incarceration for a single crime.

The court should, therefore, recede from Poore to the extent that it approves a probationary split sentence. That disposition has not been approved by the legislature and the sentence plus probation in this case violated double jeopardy by imposing more punishment than the legislature authorized.

CONCLUSION

This Court should answer the certified question by holding that a probationary split sentence is not a legislatively authorized punishment. The probationary portion of petitioner's sentences should be vacated.

Respectfully submitted,

BARBARA M. LINTHICUM
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

MICHAEL J. MINERVA
Assistant Public Defender
Florida Bar #92487
Leon County Courthouse
Fourth Floor North
Tallahassee, Florida 32301
(904) 488-2458

Attorney for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by hand delivery to James W. Rogers, Assistant Attorney General, The Capitol, Tallahassee, Florida, this 27th day of March, 1990.

MICHAEL J. MINERVA