IN THE SUPREME COURT OF FLORIDA

BARRY BUCKLEY,

Petitioner,

v. CASE NO. 75,920

STATE OF FLORIDA,

Respondent.

_____/

RESPONDENT'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

This is an appeal from the decision of the First District Court of Appeal in Buckley v. State, ___ So.2d ___, 15 F.L.W. D813 (Fla. 1st DCA March 29, 1990).

Petitioner, Barry Buckley, was the defendant in the trial court and the appellant in the district court. Respondent, State of Florida, was the prosecuting authority in the trial court and the appellee in the district court.

STATEMENT OF THE CASE AND FACTS

Respondent accepts Petitioner's statement of the case and facts.

SUMMARY OF ARGUMENT

This case will be controlled by the court's decision in Glass v. State, ____ So.2d ____, 15 F.L.W. D299 (Fla. 1st DCA 1990), appeal docketed, No. 75,600 (Fla. February 1990) The viability of the probationary split sentence as a legal sentencing alternative now is controlled by this court's decision in Poore v. State, infra. Contrary to Petitioner's assertion, Poore was not wrongly decided, for the Florida Legislature has clearly authorized probationary split sentences. Fourteen years ago the court in State v. Jones, infra, interpreted section 948.01(4), presently 948.01(8), as authorizing a trial court to impose a prison sentence followed by a period of probation without staying any portion of the prison term. As this court in the past has stated, "[I]t is a function of the judiciary to declare what the law is." Although the Florida Legislature may override a judicial interpretation of a statute, it has not chosen to exercise that power with regard to section 948.01(8).

ARGUMENT

ISSUE

> [REPHRASED] WHETHER BUCKLEY WAS TWICE PLACED IN DOUBLE JEOPARDY, WHERE THE TRIAL COURT IMPOSED A PROBATIONARY SPLIT SENTENCE AS AUTHORIZED BY THE FLORIDA LEGISLATURE AND AS APPROVED BY THE FLORIDA SUPREME COURT.

The issue presented in this case is currently pending before this court in Glass v. State, ____ So.2d ____ (Fla. 1st DCA 1990), appeal docketed, (Fla. Feb. 1990). The court's decision in Glass will determine the outcome of this case.

While Petitioner concedes that this issue is controlled by Poore v. State, 531 So.2d 161 (Fla. 1988), he nevertheless contends that Poore was wrongly decided because there is no legislative authority for the probationary split sentence imposed in this case. Respondent disagrees.

Section 948.01(4), Florida Statutes (1973) states:

> Whenever punishment by imprisonment in the county jail is prescribed, the court, in its discretion, may at the time of sentencing direct the defendant to be placed on probation upon completion of any specified period of such sentence. In such case, **the court shall stay and withhold the imposition of the remainder of sentence imposed upon the defendant, and direct that the defendant be placed upon probation after serving such period as may be imposed by the court**. (e.s.)

After noting the 1974 amendment (deletion of county jail and addition of misdemeanor and felony, excluding a capital felony), set out infra, the Florida Supreme Court in 1976 interpreted the above provision in the following manner:

> We reject the District Court's interpretation of Section 948.01(4) which requires the trial judge at the initial sentencing proceeding to impose a total sentence immediately followed by the withholding of a part thereof for use in the event probation is violated. This interpretation is inconsistent with the procedure for straight probation as authorized by Section 948.01(3), Florida Statutes, and in conflict with Section 948.06, Florida Statutes. The latter authorizes the trial judge, upon a finding that probation has been violated, to impose any sentence he might have originally imposed. Section 948.01(3), Florida Statutes, pertaining to placing a defendant on straight probation, requires the court to stay and withhold the imposition of sentence. The only difference in the wording of Section 948.01(4), Florida Statutes, is the addition of the qualifying word "remainder" in the phrase "withhold the imposition of the remainder of sentence." We read this provision of the statute to mean that the time spent in jail must be within any maximum jail sentence which could be imposed. **We find no legislative intent to require an initial imposition of the total sentence. (e.s.)**

State v. Jones, 327 So.2d 18, 25 (Fla. 1976)

One month after the decision in Jones issued, the Florida Supreme Court decided Hults v. State, 327 So.2d 210 (Fla. 1976), quashing on authority of Jones the district court's decision [Hults v. State, 307 So. 2d 489 (Fla. 2d DCA 1975)] holding that a sentence of eighteen months imprisonment followed by three years probation was illegal and void because of the trial court's failure to stay any portion of the prison term.

This court in the past has stated that "[I]t is a function of the judiciary to declare what the law is."

State v. Smith, 547 So.2d 613, 616 (Fla. 1989). In the absence of express statutory language to the contrary, section 948.01(4), Florida Statutes (1973), as interpreted by the Florida Supreme Court in Jones, clearly authorizes imposition of a term of incarceration followed by probation without suspension of any part of the incarcerative term. Although not expressly labeled as such by the court in Jones, this sentencing alternative is a probationary split sentence.

In State v. Holmes, 360 So.2d 380, 382 (Fla. 1978), the Florida Supreme Court acknowledged that "[s]ection 948.01(4) authorizes the imposition of a sentence popularly known as a 'split sentence,' that is, a sentence imposing a specified period of incarceration followed by a specified period of probation." Although not relevant to the issue here, the court in Holmes overruled that portion of Jones holding "that a trial judge may sentence a defendant to a combined period of incarceration and probation in excess of the maximum period provided by statute for the offense charged." 360 So.2d at 382.

Three years later, in Villery v. Florida Parole & Probation Com'n, 396 So.2d 1107, 1109-1110 (Fla. 1981), the Florida Supreme Court further receded from Jones. It overruled that portion of Jones holding "the trial court may place a defendant on probation and include as a condition, incarceration for a specific period of time within the maximum sentence allowed." The Villery court held that "the

maximum period of incarceration which may be imposed as a condition of probation is up to, but not included, one year." Id. at 1110. The Villery court elaborated on its holding as follows, which elaboration is relevant to the issue now before this court:

> [I]ncarceration, pursuant to the split sentence alternatives found in sections 948.01(4) and 948.03(2), which equals or exceeds one year is invalid. This applies to incarceration as a condition of probation as well as to incarceration followed by a specified period of probation.

Id., 396 So.2d at 1111.

Two years later, section 948.01(4) was amended as follows:

> (8) ~~(4)~~ 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, direct the defendant to be placed on probation or, with respect to any such felony, into community control, upon completion of any specified period of such sentence. In such case, the court shall stay and withhold the imposition of the remainder of sentence imposed upon the defendant, and direct that the defendant be placed upon probation or into community control after serving such period as may be imposed by the court. The period of probation shall commence immediately upon the release of the defendant from incarceration, whether by parole or gain-time allowances.

s. 13, ch. 83-131, Laws of Florida.

The Florida Supreme Court subsequently interpreted the last sentence of the above amendment to mean that the legislature had "reenacted the split sentence authorization

which [it] had limited in Villery." Van Tassel v. Coffman, 486 So.2d 528, 529 (Fla. 1986).

The same year that section 948.01(4) was amended, the Florida Legislature created section 921.187, which states in pertinent part:

> (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:
>
> (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. (e.s.)

s. 6, ch. 83-131, Laws of Florida.

Except for the language addressing the Villery holding, this provision in substance is indistinguishable from section 948.01(8), which repeatedly has been interpreted to authorize split sentences. This becomes even more apparent with the 1985 amendment to section 948.01(8), discussed infra.

The Fifth District Court of Appeal has interpreted the above two provisions (sections 948.01(8) and 921.187[(1)(g)]) as a legislative abrogation of the holding in Villery. Brown v. State, 460 So.2d 427 (Fla. 5th DCA 1984). The Second District Court of Appeal has likewise interpreted section 921.187(1)(g) as a legislative override of Villery. Anderson v. State, 462 So.2d 18 (Fla. 2d DCA 1984).

In 1985, section 948.01(8) was further amended as follows:

> 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 ~~direct~~ the defendant is to be placed on probation or, with respect to any such felony, into community control, 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 imposed upon the defendant, and direct that the defendant be placed upon probation or into community control after serving such period as may be imposed by the court. The period of probation or community control shall commence immediately upon the release of the defendant from incarceration, whether by parole or gain-time allowances.

s. 14, ch. 85-288, Laws of Florida.

When sections 948.01(8) and 921.187(1)(g) are read in pari materia, and in light of the legislative changes and judicial interpretations of the former section, it appears that the latest amendment to section 948.01(8) was effected simply to harmonize the two sections, without making any substantive changes. The absence of any intent to create substantive changes is made more evident by the fact that the legislature has made no effort to alter the Florida Supreme Court's opinion in Jones that the legislature did not intend to require an initial imposition of the total sentence. The following language, which the Jones court interpreted, has in substance remained unchanged throughout all of the judicial interpretations and legislative changes:

> In such case, the court shall stay and withhold the imposition of the remainder of sentence imposed upon the defendant, and direct that the defendant be placed upon probation or into community control after serving such period as may be imposed by the court.

The only change to this part of the statute is reflected by the above underlined words. On the basis of this analysis, Respondent submits that the legislature has authorized the probationary split sentence.

While the court in Poore did not mention section 921.187(1)(g), Florida Statutes, the identical language contained in section 921.187(1)(g) is contained in the 1985 amendment to section 948.01(8). The court clearly had that provision before it because the district court in Wayne v. State, 513 So.2d 689 (Fla. 5th DCA 1987) cited and discussed section 948.01(8). The court in Poore expressly disapproved of the decision in Wayne and subsequently quashed it. State v. Wayne, 531 So.2d 160 (Fla. 1988).

CONCLUSION

Based on the foregoing argument and citations of authority, Respondent respectfully requests this court to affirm the probationary split sentence imposed in this case on a finding that the sentence is authorized by the Florida Legislature and, therefore, does not violate the right against double jeopardy.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing brief on the merits has been furnished by U.S. Mail to Carl S. McGinnes, Assistant Public Defender, Leon County Courthouse, Fourth Floor, North, 301 South Monroe Street, Tallahassee, Florida 32301, this 8th day of June, 1990.

Laura Rush
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