IN THE FLORIDA SUPREME COURT

DAVID LEE HUFF, :

Petitioner, :

v. : CASE NO. 76,668

STATE OF FLORIDA, :

Respondent. :

_____ :

ON REVIEW OF A CERTIFIED QUESTION FROM
THE FIRST DISTRICT COURT OF APPEAL

BRIEF OF PETITIONER ON THE MERITS

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BRIEF OF PETITIONER ON THE MERITS

I PRELIMINARY STATEMENT

Petitioner was the defendant in the trial court and the appellant in the lower tribunal, and will be referred to as petitioner in this brief. A one volume record on appeal, including transcripts, will be referred to as "R" followed by the appropriate page number in parentheses. Attached hereto as an appendix is the opinion of the lower tribunal.

II STATEMENT OF THE CASE AND FACTS

On February 16, 1988, petitioner was placed on three years probation for three felony offenses, to run concurrently (R 2-6). On March 23, 1989, petitioner's probation was revoked, and he was sentenced to state prison for concurrent terms of two years, followed again by two years probation (R 24; 26; 29-33).

On appeal to the lower tribunal, petitioner argued that the split sentence disposition was illegal because it was not authorized by statute. The lower tribunal disagreed, on authority of its other recent decisions on the same issue, but certified the question. Appendix.

On September 26, 1990, a timely notice of discretionary review was filed.

III SUMMARY OF ARGUMENT

Petitioner will argue that his probationary split sentences are illegal because they are not authorized by statute. Although this Court has previously indicated that the sentences are legal, a close examination of the statutes at issue reveals that the sentences are not authorized by any statute.

IV ARGUMENT

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

Although this Court indicated in Poore v. State, 531 So.2d 161 (Fla. 1988) that a probationary split sentence is legal, petitioner relies on the arguments presented in Glass v. State, 556 So.2d 465 (Fla. 1st DCA 1990), review pending, case no. 75,600, oral argument set for December 6, 1990, that this type of sentencing alternative is not authorized by statute.

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). The Supreme 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), the 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, the 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. The Court apparently was not presented with the double jeopardy arguments raised now when deciding Poore and presumably will reconsider its ruling in Glass and the instant case.

In Poore, the 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:

> 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. The Supreme 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). 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.

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 Section 921.187, Florida Statutes.

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, the 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 the 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.

Petitioner's probationary split sentence 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.

V CONCLUSION

Based upon the foregoing argument, reasoning, and citation of authority, petitioner requests that this Court reverse the sentences and remand further proceedings.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the forgoing Brief on the Merits has been furnished by hand delivery to James W. Rogers, Assistant Attorney General, The Capitol, Tallahassee, Florida, this 16th day of October, 1990.

P. DOUGLAS BRINKMEYER