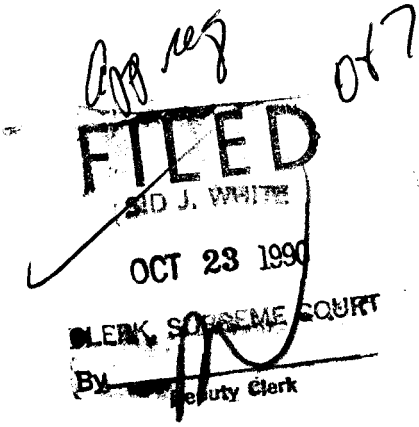
IN THE SUPREME COURT OF FLORIDA



STATE OF FLORIDA,

Petitioner,

v.

CASE NO. 76,689
5DCA NO. 89-1037

RANDY ARNETTE,

Respondent.

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PETITIONER'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

There are two separate records involved in this case: Citrus County Circuit Court Case Numbers 79-209 and 84-37. Cites to the record in Case No. 79-209 are written as "79R" and cites to the record in Case No. 84-37 are written as "84R".

STATEMENT OF THE CASE AND FACTS

Respondent, Randy Arnette, was charged in a four-count indictment with Sexual Battery, Robbery, Kidnapping and Burglary of a Dwelling While Armed, all of which offenses occurred on September 10, 1979. (79R 4). On May 15, 1981, Appellant pled guilty to two of those charges -- Burglary of a Dwelling While Armed and False Imprisonment and was sentenced as a Youthful Offender to four years incarceration for the burglary and a concurrent three year sentence for false imprisonment to be followed by two years in a community control program. (79R 55-57). During the probationary portion of his sentence, Respondent was again charged with another False Imprisonment and Sexual Battery which occurred in February, 1984. On March 6, 1986, Respondent's community control was revoked and he was sentenced to life imprisonment for the 1979 Burglary and five years in the state prison on the False Imprisonment count. Written reasons for departure from the guidelines were filed at the time of the revocation of community control. (79R 75-84, 78).[1]

On June 23, 1988, in Arnett v. State, 526 So.2d 1075 (Fla. 5th DCA 1988), the Fifth District Court of Appeal remanded the instant case for resentencing using one scoresheet and the Court reimposed a life sentence for the 1979 Burglary and five years

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[1] Respondent had already been tried and convicted of the 1984 substantive offenses of Sexual Battery and False Imprisonment and was sentenced to life imprisonment for the Sexual Battery and a concurrent five year sentence for the False Imprisonment in February, 1985. (84R 174-178). He was allowed a belated appeal of said sentences on the issue of the validity of the life sentence under the sentencing guidelines scoresheet in effect at that time and that matter is presently before the appellate court in Arnette v. State, 5th District Court Case No. 89-2388).

concurrent for the 1979 False Imprisonment. (79R 158-160). In May, 1989, Respondent was granted a belated appeal from this resentencing which resulted in the opinion of the Fifth District issued in its Case No. 89-1037 on September 20, 1990. Based upon the question certified in that opinion to be one of great public importance, the Petitioner filed its Notice to Invoke Discretionary Jurisdiction in this case on September 28, 1990.

SUMMARY OF ARGUMENT

In 1979, Respondent broke into the home of a 78 year old woman and imprisoned her at gunpoint. In 1984, while under community control for the 1979 offenses, he raped another woman. The trial court properly terminated community control and sentenced Respondent to life imprisonment for the 1979 Armed Burglary and five years incarceration for False Imprisonment. Both the original offense and the subsequent acts resulting in the violation of community control occurred prior to the 1985 amendment to the Youthful Offender Statute which limited sentencing of the youthful offender upon violation of community control to six years imprisonment. The law in effect at the time of the commission of the crime controls the penalty at sentencing. Likewise, the law in effect at the time of the violation of community control controls the penalty at sentencing. Therefore, the pre-amendment law regarding "resentencing" of a youthful offender applies to Respondent.

Section 948.14, Florida Statutes (1989) specifically states that a violation of community control subjects the youthful offender to Florida Statute § 948.06(1) authorizing "...any sentence which it might have originally imposed before placing...the offender on community control". In Brooks v. State, 478 So.2d 1052 (Fla. 1985), this court held that upon revocation of a youthful offender's community control, the trial court may treat the defendant as though it had never placed him in community control and sentence him in accordance with § 948.06(1). In imposing the life sentence in 1986 for the 1979

Armed Burglary, the trial court set forth in writing its reasons for exceeding the guidelines. (79R78). The life sentence was legal and should not have been vacated by the District Court of Appeal. The question certified should be answered in the affirmative.

ARGUMENT

THE TRIAL COURT DID NOT ERR IN SENTENCING RESPONDENT TO LIFE IMPRISONMENT FOR THE 1979 ARMED BURGLARY AFTER REVOKING HIS COMMUNITY CONTROL AS A YOUTHFUL OFFENDER FOR A 1984 SEXUAL BATTERY.

In Brooks v. State, 478 So.2d 1052 (Fla. 1985), this Court was presented with a two questions certified by the 1st District Court of Appeal as being of great public importance, one of which was:

> ...may the circuit court, upon revocation of a youthful offender's community control program status, treat the defendant as though it had never placed him in community control and sentence him in accordance with section 948.06(1), Florida Statutes?

That question was answered in the affirmative. Based upon that answer, it cannot be said that the trial court in the case subjudice erred in filing written reasons for departure from the sentencing guidelines and sentencing Respondent to life imprisonment for Armed Burglary and five years concurrent incarceration for False Imprisonment after revocation of his community control based upon convictions for Sexual Battery and False Imprisonment committed during the time he was in the community control program for the earlier crimes.

The Fifth District Court of Appeal vacated those sentences holding that, prior to the 1985 amendment to the Youthful Offender Act, Florida Statute Ch. 958, upon a violation of probation, a youthful offender was subject to a four year limitation on "resentencing". In doing so, the Fifth District

Court recognized that its ruling was contrary to this Court's answer to the question certified in Brooks, supra, and certified this question as one of great public importance. The District Court cited nine decisions from four of the five Districts which it felt contained holdings contrary to Brooks: Brown v. State, 492 So.2d 822 (Fla. 2d DCA 1986); Timothy Crispy (I) v. State, 475 So.2d 1034 (Fla. 1st DCA 1985); Lane v. State, 470 So.2d 30 (Fla 5th DCA 1985); Hart v. State, 463 So.2d 491 (Fla. 2d DCA (Fla. 2d DCA 1985); Clem v. State, 462 So.2d 1134 (Fla. 4th DCA 1984); James Crosby (II) v. State, 462 So.2d 607 (Fla. 2d DCA 1985); Ellis v. State, 436 So.2d 342 (Fla. 1st DCA 1983), rev. denied 443 So. 2d 980 (Fla. 1984); Brandle v. State, 406 So. 2d 1221 (Fla. 4th DCA 1981); Greene v. State, 398 So. 2d 1011 (Fla. 1st DCA 1981), appeal dis'm., 406 So.2d 1118 (Fla. 1981).

In Brown, supra at 824, the Second district said:

> Upon violating his community control, appellant could have been resentenced up to the statutory maximum of life imprisonment for second degree murder, section 782.04(3), Florida Statutes (1981), where not reclassified as a youthful offender. (citing Crosby II).

In Crosby II, the Second District did hold that concurrent eight year sentences upon violation of community control exceed the maximum allowed by the Youthful Offender Act. Likewise, in Crosby (I), the First District said that where a defendant is initially sentenced as a youthful offender, upon revocation of his probation in a community control program, the trial court was still bound by the limits of the Youthful Offender Act.

In Lane, supra, the Fifth District Court said that seven years incarceration after violation of community control exceeded the limits of the Youthful Offender Act. Also in Hart, supra, the twenty year sentence upon revocation of community control for armed robbery was held to have been excessive in light of Crosby II.

In Clem, supra as, in Brooks, the question of whether the trial court could impose whatever sentence it might originally have imposed without regard to the Youthful Offender Act was certified to this Court where the defendant was sentenced to sixty years for robbery upon the revocation of his community control.

The First District discussed the Clem and Brooks decisions as they relate to the 1985 amendment to Florida Statute § 958.14 in Watson v. State, 528 So.2d 101, 102 (Fla. 1st DCA 1988). The First District concluded that the only logical reason for the amendment was, based upon this Court's affirmative answer to the questions certified in Brooks, to change the existing law so that once a court has given a defendant youthful offender status, it must continue that status through resentencing for violation of community control. To hold otherwise would be to assume the legislature intended to enact a nullity.

The confusion seems to have stemmed from this Court's decision in Goodson v. State, 403 So.2d 1337 (Fla. 1981). In that case, the question certified was whether, under Florida Statute § 958.04(2) (Supp. 1978), if a defendant meets the statutory prerequisites for treatment as a youthful offender

under the act, must the trial court sentence him as such or is the statute merely permissive. This Court found that the language of the statute was mandatory and answered the question certified affirmatively. Thereafter, in Greene v. State, 398 So.2d 1011 (Fla. 1st DCA 1981), the defendant was sentenced as a youthful offender for burglary. While on community control, he was charged with three separate robberies, leading to the revocation of his probation. The District Court certified the same question answered in Goodson, whether classification as a youthful offender is mandatory when the statutory prerequisites are satisfied. What it really should have certified was not whether application of the statute is mandatory to those who satisfy the statutory prerequisites, but whether the trial court is still bound by the limits of the youthful offender act in sentencing a youthful offender after revocation of his community control or whether it is limited solely by the statutory maximum for the offenses of which he was initially sentenced as a youthful offender. In Greene v. State, 406 So.2d 1118 (Fla. 1981), this Court dismissed the petition simply citing Goodson, even though Goodson had nothing to do with resentencing after violation of community control by a youthful offender.

From that point on, the District Court's decisions have either relied specifically on Greene or cases derived from it for the proposition that a youthful offender's sentence after revocation of his community control is still limited by that statute. Brandle v. State, 406 So.2d 1221 (Fla. 4th DCA 1981); Ellis v. State, 436 So.2d 342 (Fla. 1st DCA 1983); Clem v. State,

462 So.2d 1134 (Fla. 4th DCA 1984); Crosby (II) v. State, 462 So.2d 607 (Fla. 2d DCA 1985); Crosby (I) v. State, 475 So.2d 1034 (Fla. 1st DCA 1985); Hart v. State, 463 So.2d 491 (Fla. 2d DCA 1985).

This Court's answers to the questions certified in Brooks should have resolved this problem, but again the ambiguity with which the question was phrased and the emphasis this Court placed upon the first question certified concerning the jurisdiction of the trial court to revoke the community control have contributed to the ongoing confusion.

In Franklin v. State, 526 So.2d 159 (Fla. 5th DCA 1988), approved 545 So.2d 851 (Fla. 1989), this Court affirmed a youthful offender's 15 year sentence upon violation of his probation. This Court held that, in a case involving a probationary split sentence, upon violation of probation or community control, the judge may impose any sentence so long as it does not exceed the one-cell upward increase from the guidelines. Following the Franklin decision, the Fourth District held that a youthful offender was properly sentenced as an adult upon violation of his community control. Hamilton v. State, 553 So.2d 387 (Fla. 4th DCA 1989).

The next complication is the applicability of the 1985 amendment to the Youthful Offender Act, limiting imprisonment to six years after violation of community control, to a situation where the event upon which the revocation proceedings are based occurred prior to the amendment, but the revocation itself occurred after the amendment. Citing Weaver v. Graham, 450 U.S.

24, 101 S.Ct. 960, 67 L.Ed. 2d 17 (1981), the Fifth District held that the amendment can be constitutionally applied retroactively to the benefit of the youthful offender. That case dealt with the repealing of a Florida statute which resulted in a reduction in the calculation of gain time for prisoners convicted and sentenced prior to its repeal. To be ex post facto, the law must be retrospective and disadvantage the offender affected by it. The key is whether the change in the law results in the imposition of punishment more severe than the punishment assigned by law when the act to be punished occurred. In the instant case, the amendment to the Youthful Offender Act in 1985, did not result in an enhancement of the possible penalties for Respondent's 1979 and 1984 crimes and did not violate the ex post facto prohibition.

In its opinion, the Fifth District Court distinguished this Court's holding in State v. Watts, 558 So.2d 994 (Fla. 1990), because, in that case unlike the instant case, the conduct which resulted in the revocation of community control took place after the 1985 amendment. In Watts, at 998, this Court distinguished Castle v. State, 330 So.2d 10 (Fla. 1976) and State v. Pizarro, 383 So.2d 762 (Fla. 4th DCA 1980) which construed Article X Section 9 of the Florida Constitution to bar criminal defendants from benefitting from changes in the statutes controlling the original prosecution and sentence, because all of the criminal conduct in those cases occurred before the changes in the law. Based on these cases, the Fifth District Court of Appeal concluded that the pre-amendment law regarding resentencing

applies to Respondent and concluded that a four year limitation on resentencing applied. The State agrees with the District Court that the pre-amendment law applies to Respondent's resentencing, but, based upon the Brooks decision, disagrees with its conclusion that the pre-amendment law limited resentencing to only four years incarceration. Upon revocation of community control, the trial court could sentence the defendant just as though he had never been in the youthful offender program.

CONCLUSION

Based on the arguments and authorities presented above, Respondent respectfully requests that this court answer the question certified by the District Court of Appeal in the affirmative by holding that "resentencing" upon violation of the probationary portion of a probationary split sentence under the Youthful Offender Act prior to the 1985 amendment is limited only by the maximum statutory period for the offense involved as is implicit from this Court's opinion in Brooks v. State, 478 So.2d 1052 (Fla. 1985) and, based on that answer, the decision of the District Court of Appeal vacating Respondent's life sentence for Burglary and five years incarceration for False Imprisonment should be reversed and the sentences imposed by the trial court should be approved and reinstated.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Petitioner's Brief on the Merits has been mailed to Michael S. Becker, Esquire, Attorney for Respondent, at the Office of the Public Defender, 112-A Orange Avenue, Daytona Beach, Florida 32114, this 22nd day of October, 1990.

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