IN THE SUPREME COURT OF FLORIDA

CASE NO. 77,324

STATE OF FLORIDA,

Petitioner,

vs.

MICHAEL PERKO,

Respondent.

****

ON PETITION FOR DISCRETIONARY REVIEW

****

PETITIONER'S REPLY BRIEF

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STATEMENT OF THE CASE AND FACTS

The State relying on its statement of the case and facts as it appears at pages two (2) through four (4) of its initial brief, hereby moves this Honorable Court to strike Respondent's statement of the case and facts (AB[1] 2) as being in total contravention of Fla. R. App. P. 9.210(c). Rule 9.210(c) provides:

> **(c) Contents of Answer Brief.** The answer brief shall be prepared in the same manner as the initial brief; **provided that the statement of the case and of the facts shall be omitted unless there are areas of disagreement, which should be clearly specified. ...**

Respondent's statement of the facts does not specify any areas of disagreement with the State's statement of the case, but only sets out to inform this Court of his "understandings" of the plea bargain he entered into at the trial court, without the benefit of supplying this Court and all parties with a transcript, or other document that would support his allegations.

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[1] Reference to Respondent's answer Brief shall be made by the symbol "AB" followed by the appropriate page number.

SUMMARY OF ARGUMENT

Daniels does not stand for the proposition that a defendant who is arrested for different offenses on different dates is entitled to have his jail time credit applied equally to concurrent sentences without taking into account the time spent in jail for each offense. Thus, under the circumstances of the present case, the District Court erroneously reversed the trial court's denial of Respondent's motion to correct the sentence imposed on the 1990 possession of cocaine conviction. The certified question should be answered in the affirmative, the District Court's opinion of November 14, 1990, should be quashed, and the trial court's denial of the 3.800 motion affirmed.

ISSUE

POINT I

APPELLANT IS NOT ENTITLED TO HAVE THE TIME SERVED ON THE 1989 GRAND THEFT CHARGES CREDITED AS TIME SERVED ON THE SENTENCE RECEIVED ON THE NEW 1990 POSSESSION OF COCAINE CONVICTION, EVEN THOUGH THE TWO SENTENCES WERE TO BE SERVED CONCURRENT WITH EACH OTHER.

This Honorable Court accepted jurisdiction solely to answer the question certified to be one of great public importance by the Fourth District Court of Appeal. This Court has no jurisdiction to consider Respondent's complaints and suggestions, raised for the first time now before this Court, that he entered an involuntary plea at the trial level because the trial court interpreted "credit for time served" inconsistent with the common understanding of words (RAB 5-6; 19). The case went to the District Court of Appeal as a direct appeal from the trial court's denial of a motion to correct sentence under Fla. R. Crim. P. 3.800; and was decided on those terms. By his motion to correct sentence Respondent did not seek to withdraw his voluntary plea of guilty, but only sought credit for time served. On appeal therefore no question of the voluntariness of the plea, or the trial court's denial of any such motion was before the District Court to decide. Respondent is therefore procedurally barred from attempting to attack the validity of his plea. The issue not being before this Court, all of Respondent's allegations reference the validity of his plea should be stricken from the brief, and ignored by the Court.

The State would otherwise rely in the arguments made in its Initial Brief, except to point out that Respondent's main reliance on Jenkins v. State, 285 So.2d 5 (Fla. 1973) is misplaced. Jenkins was tried and adjudged guilty on both counts of one information filed in Case No. 61250 of breaking and entering with intent to commit a felony and grand larceny. The trial court sentenced Jenkins to five years, with credit for 304 days spent in county jail awaiting sentence, on count one; and an additional five years on count two, to run concurrently with count one. Because the sentence on count two did not mention credit for time spent in jail awaiting sentence on the information, Jenkins subsequently filed an original proceeding in habeas corpus before this Court seeking credit time for the time spent in county jail awaiting sentence on count two since the two sentences were to be served concurrent. Agreeing that Appellant was entitled to the same credit on both counts of the one information, this Court stated:

> We agree with the Petitioner's contention. To conclude the sentencing judge only intended to grant Petitioner credit time on the first concurrent sentence and not on the other would necessarily result in Petitioner serving the longer sentence on Count II and in not having the benefit of the credit time granted him by the trial court. To adopt the interpretation of the Respondent would be tantamount to granting the Petitioner credit time and then taking it away, in short a meaningless act, resulting in no credit time whatsoever. We are not persuaded by such an absence of logic.

* * *

> We hold, therefore, that Petitioner is entitled to credit time of 304 days spent in the county jail on both sentences of five years in Case No. 61250 to run concurrently ... .

Id., at 6. Because Jenkins had been charged in one information with both counts, it can be assumed that he was arrested on both counts at the same time, therefore, he spent the same period of time awaiting trial on both counts; and therefore he was entitled to the same credit for time spent in county jail on the sentences on each count. This holding is consistent with the later holding by this Court in Daniels v. State, 491 So.2d 543 (Fla. 1986).

The State submits that if Respondent had spent the same period of time in jail or in prison for the 1989 grand theft and the 1990 possession of cocaine charge, he would be entitled to equal credit for time spent in prison under the reasoning of Jenkins and Daniels. However, since those are not the facts here, Respondent is not entitled to the same amount of credit on both for the simple reason that the sentences on each crime are to be served concurrently with each other. To apply Daniels as Respondent contends, he would be entitled to credit for the year he spent in jail on the grand theft conviction toward the sentence on the possession of cocaine even though he had not committed the crime of possession when he served the year on the grand theft. This result would be absurd.

Since the District Court obviously misinterpreted the holding in Daniels, the State submits the opinion filed by the

Fourth District should be quashed, and the trial court's denial of Respondent's 3.800 motion affirmed as being consistent with the correct interpretation of Daniels reached in State v. Smith, 525 So.2d 461 (Fla. 1st DCA 1988); Bush v. State, 519 So.2d 1014, 1016 (Fla. 1st DCA 1987), rev. denied, 528 So.2d 1181 (Fla. 1988); and Whitney v. State, 493 So.2d 1077 (Fla. 1st DCA 1986), rev. denied, 503 So.2d 328 (Fla. 1987).

CONCLUSION

WHEREFORE, based on the above and foregoing arguments and authorities cited therein, the State of Florida respectfully requests this Honorable Court answer the certified question in the **AFFIRMATIVE,** and **QUASH** the opinion of the District Court of Appeal, Fourth District, filed November 14, 1991, and **AFFIRM** the trial court's denial of Respondent's 3.800 Motion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing "Petitioner's Reply Brief" has been furnished by U.S. Mail to: JAMES MAJOR, #051559/#1004, INMATE IN ASSISTANCE OF RESPONDENT, at Desoto Correctional Institution, P. O. Drawer No. 1072, Arcadia, Florida 33821 and to MICHAEL J. PERKO, #050675, RESPONDENT PRO SE, Avon Park Correctional Institution, P. O. Box 1100, Avon Park, FL 33825-1100 this 8th day April, 1991.

Georgina Jay-Ivosa
Of Counsel