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FILED
SID J. WHITE
SEP 12 1991
CLERK, SUPREME COURT
By _____
Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

PETER N. FRASER,
Petitioner,

v.

STATE OF FLORIDA,
Respondent

Case. No. 78,333

ON APPEAL FROM THE SECOND DISTRICT COURT OF APPEAL
STATE OF FLORIDA

BRIEF OF THE RESPONDENT

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SUMMARY OF THE ARGUMENT

I. Fraser already had the opportunity to appeal the question of whether Pope should not have been applied in his case. This was when his first appeal was decided. Fraser waived his right to complain about any error in that decision because he did not seek review of it in this court. Now, after resentencing, law of the case applies and Fraser is barred from seeking review of this issue. The Second District erred in certifying the question on this point, since it already held that law of the case prevented addressing the issue on the second appeal. The certified question is moot in this case and should not be answered. Even if the issue is reached, this court has already applied Pope to a downward departure situation in Cheshire.

II. Community control is not incarceration and cannot be credited in sentencing. In Pennington, this court established the criteria for the types of state supervision that require crediting at sentencing, and all of them involve confinement in an institution. Even confinement in rehabilitative programs while on probation will not be credited. Community control is not the functional equivalent of incarceration in a county jail. By its very definition in the statutes, it operates in lieu of incarceration, and has rehabilitative goals.

ARGUMENT

ISSUE I

THE ISSUE IS MOOT AND THE CERTIFIED QUESTION SHOULD NOT BE ANSWERED. RETROACTIVE APPLICATION OF POPE V. STATE, 561 SO.2D 554 (FLA. 1990), WAS DECIDED ON FRASER'S FIRST APPEAL AND IS LAW OF THE CASE

The Second District expressly held that the law of the case in the instant case requires the trial judge to sentence within the guidelines. Because the issue had already been decided on the first appeal, State v. Fraser, 564 So.2d 1262 (Fla. 2d DCA 1990), and appellant failed to appeal the remand forbidding departure, in reliance on Pope v. State, 561 So.2d 554 (Fla. 1990), the point became law of the case. Love v. State, 198 So.2d 559 (Fla. 1990) (failure to appeal from first appellate decision waives issue and issue becomes law of the case).

This court should decline to answer the certified question on this issue as the question is moot in this case. The Second District erred when it certified the question about retroactive application of Pope, since it had already noted that law of the case mandated adherence it its prior decision. An answer to the certified question is irrelevant to the instant case. If this court were to answer the certified question such that Pope would not apply retroactively in this case, it would be error to allow the trial court to depart again, as the issue was waived when no review was sought in this court on the first appeal.

The issue is not cognizable on this appeal. Even if it were, this Court already decided this issue in Cheshire v. State,

568 So.2d 908 (Fla. 1990), by applying Pope to deny the trial court the option of downward departure on remand after this court determined the original sentence was an unintentional downward departure because of an error in calculation on the scoresheet.

ISSUE II

COMMUNITY CONTROL DOES NOT COUNT IN CALCULATING TIME SERVED

Appellant overlooks the polestar case on this issue, Pennington v. State, 398 So.2d 815 (Fla. 1981):

> We conclude that North Carolina v. Pearce [, 395 U.S. 711 (1969)] does not extend double jeopardy protections to require sentence credit for probationary order restrictive conditions. Halfway houses, rehabilitative centers, and state hospitals are not jails. Their purpose is structured rehabilitation and treatment, not incarceration.
>
> We are aware that some courts have determined that credit for rehabilitation center confinement must be given. Those jurisdictions, however, have controlling statutes which require that result. Our statute, section 921.161(1), states: "[T]he court imposing a sentence shall allow a defendant credit for all of the time he spent in the county jail before sentence" (emphasis ours). We decline to extend the statute's plain language to require that credit be given in other circumstances.

398 So.2d at 817 (citations deleted).

This court refined the doctrine of Pennington when it subsequently determined that involuntary confinement in a state hospital should be credited.

> [W]e find that commitment for incompetency, unlike probationary rehabilitation, infringes upon significant liberty interests in a particularly coercive manner. Probationary conditions are more in the nature of a contract between the probationer and the state. The defendant clearly has a choice to reject those conditions, albeit at the risk of continued detention in jail or prison. Thus, rather than restricting liberty, probationary rehabilitation usually serves to increase it by allowing the probationer an escape from involuntary confinement already lawfully imposed, in favor of a freer environment such as a community-based halfway house. For this reason, participation in such a rehabilitation program does not constitute a coercive deprivation of liberty, and a probationer is not entitled to credit for time spent there after a court finds that he has violated the terms of his probation.
>
> Tal-Mason, on the other hand, clearly had no

> choice when he was confined in a state mental institution. He entered into no agreement with the state to obtain an early release from confinement or from any other punishment less restrictive than jail time. . . .
>
> . . . .
>
> For these reasons, we decline to read section 921.161(1), Florida Statutes, as a statement that jail-time credit may only be granted for time spent in an institution formally designated as a "county jail." . . . .
>
> Our courts already have tacitly recognized that a detainee must be granted credit for time served prior to conviction in any institution serving as the functional equivalent of a county jail.

Tal-Mason v. State, 515 So.2d 738, 739-40 (Fla. 1987).

At least two district courts of appeals have specifically held that a defendant shall not be given credit for community control served. Butler v. State, 530 So.2d 324 (Fla. 5th DCA), review denied, 539 So.2d 475 (Fla. 1988); Matthews v. State, 529 So.2d 361 (Fla. 2d DCA 1988).

This court recently held that community control does not count as a sentence of imprisonment as an aggravating factor in the penalty phase of a death case. Trotter v. State, 576 So.2d 691, 694 (Fla. 1990).

Finding that community control is not appropriate for credit time is consistent with this court's holdings in Pennington and Tal-Mason. In Tal-Mason, this court noted that credit should be given for time served "in any institution serving as the functional equivalent of a county jail." (Court's emphasis deleted, emphasis added.) Section 948.10(2), Florida Statutes (1989), mandates that "Community control shall be an individualized program in which the offender is restricted to noninstitutional quarters or restricted to his own residence subject to an authorized level of limited freedom." Community control is, therefore,

a noninstitutional alternative to incarceration and, as such, falls short of the degree of restraint on liberty to justify granting credit for time served. More particularly, community control usually involves the convict being confined to his home except for work or other prescribed activities such as attending treatment programs.

Community control is also a rehabilitative oriented program. Just as this court found as to probation programs that "Their purpose is structured rehabilitation and treatment, not incarceration," Pennington, so to the purpose of community control is, "in lieu of incarceration," section 948.10 (1), to provide a program for each offender which "shall include diagnosis of treatment needs in the areas of education, substance abuse and mental health, community sanction provisions, restitution and community service provisions, rehabilitation objectives and programs, and a schedule for periodic review and reevaluation of programs." § 948.10(4)(a).

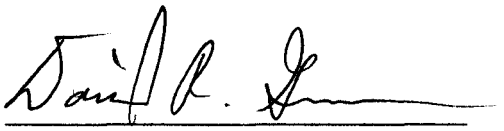
Petitioner took the option offered him by the court of abiding by the terms of community control, in exchange for his relative freedom and complete avoidance of incarceration. He could have rejected the community control, or refused to abide by technical aspects forcing his resentencing to incarceration. Because of this election, he cannot now claim a right to credit for his freedom.

CONCLUSION

This court should decline to answer the certified question as to retroactive application of Pope because it is moot in this case. In the alternative, this court should rule, consistent with Cheshire, that Pope applies retroactively to downward departures. As to the certified question about community control this court should find no right to credit for time served on community control during the appeal of that sentence.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to Allyn Giambolvo,Assistant Public Defender, Criminal Court Building, 5100 - 144th Avenue North, Clearwater, Florida 34620, this date, September 10, 1991.

OF COUNSEL FOR THE STATE