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IN THE SUPREME COURT OF FLORIDA

TIMOTHY WILLIAM TRIPP,

Petitioner,

v. CASE NO. 79,176

STATE OF FLORIDA,

Respondent.

DISCRETIONARY REVIEW OF DECISION OF THE SECOND DISTRICT COURT OF APPEAL OF FLORIDA

ANSWER BRIEF OF RESPONDENT ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

The Respondent agrees with the statement of the case and facst as stated by Petitioner.

SUMMARY OF THE ARGUMENT

When a Defendant is sentenced to straight prison time on one count and consecutive probation on another count, he is not entitled to credit for the time served on the 1st count when he is sentenced on the 2nd count after violating his probation because such a sentence is not a split sentence.

ARGTJMENT

ISSUE

IF A TRIAL COURT IMPOSES A TERM OF PROBATION CONSECUTIVE TO A SENTENCE OF INCARCERATION ON ANOTHER OFFENSE, CAN JAIL CREDIT FROM THE FIRST OFFENSE BE DENIED ON A SENTENCE IMPOSED AFTER REVOCATION OF PROBATION ON THE SECOND OFFENSE.

When a Defendant is charged with committing multiple crimes and is sentenced to straight prison time on one count and consecutive probation on another count, he is not entitled to credit for the time served on the 1st count when he is sentenced on the 2nd count after violating his probation because such a **sentence is not a** split **sentence. In the instant** case, **Petitioner pled** guilty to burglary and grand theft. The guidelines called for up to 4½ years in Florida State Prison, (FSP). **Petitioner** was Sentenced **as** follows:

1. burglary---4 years FSP
2. grand theft---4 years probation

   consecutive to FSP in count **I.**

After 10 months, Petitioner had served his **4** year sentence for burglary and began serving his 4 years of probation. He subsequently admitted to violating his probation, and it was revoked. At the revocation hearing, the guidelines called for up to 4½ years in prison.[1] **The** trial court believed it was bound to credit Petitioner with the **4** years "served" on the burglary, and

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[1] Neither party nor the trial court considered the use of the one cell bump for sentencing **after** violating probation.

sentenced Petitioner on the grand theft to 4½ years with credit for the 4 years served on the separate offense of burglary. On appeal by the State, the 2nd District reversed finding Petitioner was not entitled to credit when being sentenced after revocation of his probation on the grand theft for the 4 years he served on the burglary. The 2nd District was correct in this holding. To do otherwise would be to reward Petitioner for violating his probation. Under Petitioner's analysis, trial courts could no longer enforce probation. Probationers could terminate probation at will by violating it and serving either no time or minimal time incarceration. As this Court stated in State v. Perko, 588 So.2d 980 (Fla. 1991), "... the opinion of the district court resulted in Perko being rewarded with a reduced sentence on the new drug **offense** solely because he previously had committed a grand theft." Perko at 982. Though Perko is not directly on point, it supports the District Court's holding that a defendant does not get credit for time served an one count when he subsequently violates his probation on another count and receives a prison sentence on that count.

Perko was sentenced to imprisonment followed by probation for grand theft auto. After his release from prison he committed a new drug offense thereby violating his probation, At sentencing for the new drug offense, Perko sought credit for the time served and gain time accrued on the grand theft auto.[2] The trial court

[2] Perko would have been entitled to credit for time served on the grand theft auto when being sentenced for the grand theft auto after violating his probation on that charge.

declined to award this credit but the 4th District reversed. This Court reversed finding the District Court's reliance upon State v. **Green, 547 So.2d 925 (Fla. 1989),**[3] and Daniels v. State, 491 So.2d 543 (Fla 1986), in awarding Perko the credit, was misplaced. This Court explained that in Green it held only that "when sentencing for the violation of probation, (in Perko the grand theft auto; in the instant case, the grand theft; in Green, the attempted sexual battery), the trial court must give the defendant credit for time served and gain-time accrued during any earlier imprisonment for the offense underlying the violation of probation." (In Perko, this would be the original imprisonment "served" on the grand theft; in the instant case, it would be any original imprisonment served on the grand theft, which there was none; in Green, it was the original 4½ years "served" an the attempted sexual battery.) This Court held that when a defendant has violated probation by committing a new offense, the sentence for that new offense should not include credit for time served

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3 In State v. Green, 547 So.2d ***925*** (Fla. 1989), Green pled no contest to 2 counts of attempted sexual battery and was sentenced **as** follows:

1. att ***sex*** batt---4½ FSP followed by **3** yrs prob;
2. att **sex** batt---4½ FSP followed by **3** yrs prob;

When sentenced, Green received credit for jail time **spent** awaiting sentencing of 287 days. Green served his 4½ year prison term in 518 days because of gain time. Once Green was released from prison he began his **3** years probation which was subsequently revoked. Green was sentenced to 7 years FSP after revocation with credit for the 287 days jail time and the 518 days actually previously served. He did not receive the gain time accrued on his **4½** year prison term. This Court held that Green was entitled to **"credit** earned gain-time against the new sentence imposed for probation violation." Green at 926.

and gain-time accumulated while the defendant was incarcerated for the earlier offense that underlay the order of probation. Just **as** Perko was not entitled to credit for the time served on the grand theft auto when he was sentenced for the drug offense, Tripp is not entitled to credit for the time served on the burglary when being sentenced for the grand theft. Respondent has not overlooked the fact that at issue in Perko was Perko's being sentenced on the new crime, the drug offense. Tripp's sentence on the new crimes of trespass and the new burglary are not at issue in this case. However, presumably Perko was sentenced for all pending charges, including the new drug offense, under a single scoresheet yet this Court held Perko did not get credit for time served on one crime in the sentencing of another distinct crime. The same analysis applies to the instant case.

As set out in the 2nd District's opinion, the 4th and 5th District's have similarly held that Defendants are not entitled to **credit** for time served in these types of **cases.**[4] Though finding Tripp was not entitled to credit for time served on the burglary when he was sentenced on the grand theft after his probation was revoked, the 2nd District certified the above question to this Court because of its concern that its decision may conflict with the spirit **of** the sentencing guidelines and the

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[4] **See** Sylvester v. State, 572 So.2d 947 (Fla. 5DCA 1990); Ford v. State, **572** So.2d **946** (Fla. 5DCA 1990); State **v.** Folsom, 552 So.2d 1194 (Fla. 5DCA 1989); State v. Rodgers, **540** So.2d 872 (Fla. 4DCA 1989); But see Fullwood v. State, 558 So.2d 168 (Fla. 5DCA 1990).

limitations imposed in Lambert v. State, 545 So.2d 838 (Fla. 1989), and Green. The District Court was also concerned its decision could lead to abusive sentencing practices.[5]

Since Green involves a split sentence, the instant opinion by the 2nd District **does** not offend Green. As to the concerns about Lambert and abusive sentencing practices, this Court's recent opinion in Williams v. State, 17 FLW S81 (Fla. February 6, 1992), gives guidance on the instant issue. In Williams, this Court held that multiple violations of probation was no longer a valid basis for departure from the sentencing guidelines **but** that a trial court could depart one cell for every violation. This opinion maintains the spirit of the sentencing guidelines of uniformity in sentencing while giving trial courts the power to enforce their orders of probation. This Court held:

> It is entirely consistent to conclude that where there are multiple violations of probation, the sentence may be successively bumped to one higher cell for each violation. To hold otherwise might discourage judges from giving probationers a second or even a third chance. Moreover, a defendant who has been given **two** or more chances to stay out of jail may logically expect to be penalized for failing to take advantage of the opportunity.

Williams at **82.**

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5 In footnote 3 of the opinion, the District Court posits the case where a Defendant charged in a multiple count information has been sentenced to consecutive terms of probation. If the Defendant violated each of his probations, his resulting sentence could be far beyond the permitted range. This is true. But as discussed later, this Court recently **held** that a defendant who repeatedly violates his probation should expect an increased sentence.

Applying the principles of Williams to the issue presented in the instant case alleviates the concerns of the District Court about Lambert and abusive sentencing practices. **As** to Lambert, Williams has explained that Lambert did not address multiple violations of probation. As to the District Court's concern about abusive sentencing practices, the guidelines will apply to each revocation sentencing. It will only be after Defendant has repeatedly violated several different probations that he will be subject to successive revocations of probation and successive guidelines sentences. Looking at the hypothetical from Tripp at footnote **3** where a Defendant is sentenced to multiple consecutive probations, (presumably the probations are consecutive to each other and to an initial guidelines prison sentence on count one), when the Defendant violates all his probations by committing a new offense, his new guidelines score will be bumped **up** one cell. The court can then revoke his probation on all counts and sentence him to the new guidelines sentence on each count concurrently (without credit for the time served on count one), or the court can revoke his probation as to only one count and give him a guidelines sentence on that count (not giving him credit for the time served on count one) and reinstate his probation on the other counts. In either case, Defendant will not have the problem as posed by the District Court of a sentence "far beyond the permitted guidelines range if a defendant violated each of his probations" unless and until he repeatedly violates his probation. If Defendant again violates probation,

the court may revoke any of the remaining probations and sentence Defendant to the guidelines with the bump for that count, As this Court stated in Williams, "a defendant who has been given two or more chances to stay out of jail may logically expect to be penalized for failing to take advantage of the opportunity." Admittedly, as the facts of the instant case show, a Defendant who receives probation consecutive to a prison sentence and who violates that probation can serve more time than a Defendant who receives straight prison time or a probationary split sentence. See Sylvester v. State, 572 So.2d 947 (Fla. 5DCA 1991), "... if a court imposes a straight prison term for one offense followed by a straight probation term for another offense, the application of the sentencing guidelines in resentencing following revocation of probation can lead to a harsher penalty than if split sentences had been imposed originally for each offense." There is nothin gin Green, Lambert or Poore to proscribe such a result.

Poore v. State, 531 So.2d 161 (Fla. 1988), sets out the 5 sentencing alternatives available to trial courts in Florida: 1. confinement 2. a "true split sentence" 3. a "probationary split sentence" 4. a Villery[6] prabationary sentence, and 5. straight probation. "In Poore, this Court held "if the defendant violates his probation in alternatives (3), (4), and (5), section 948.06(1) and Pearce[7] permit the sentencing judge to impose any

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[6] Villery v. Florida Parole & Probatian Comm'n, 396 So.2d 1107 (Fla. 1981).

[7] North Carolina v. Pearce, 395 U.S. 711 (1969).

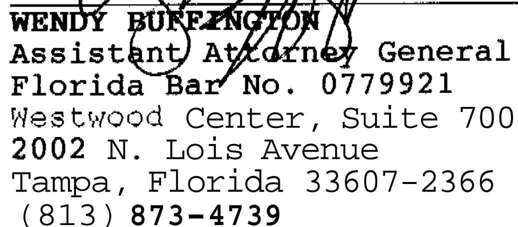
sentence he or she originally might have imposed, with credit for time served and subject to the guidelines recommendation.'' Poore at 164. Respondent disagrees with the 2nd District's statement that "the sentencing method approved in this case is not expressly recognized in Poore". Respondent believes that this Court's statement in Poore announcing the 5 sentencing alternatives available in Florida meant that each alternative was available per charge, not per charging instrument. Therefore, in this case, the 1st alternative of confinement was applied to count 1 and the 5th alternative of straight probation was applied to count 2. When Tripp's probation on count 2 was revoked, the sentencing judge was allowed to impose "any sentence he or she originally might have imposed, with credit for time served and subject to the guidelines recommendation.'' The guidelines called for 4½ years. Tripp was not entitled to any credit for time served because he had served no time on that count.

CONCLUSION

For all the reasons cited by the District Court opinion and the cases cited therein, in addition to the reasons set forth by Respondent, Respondent asks this Court to affirm the District Court opinion and answer the certified question in the affirmative.

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 Andrea Norgard, Assistant Public Defender, P.O. Box 9000-Drawer PD, Bartow, Florida **33830,** on this 18th **day** of February, 1991.

OF COUNSEL FOR RESPONDENT