D.A. 35-93 097 w/app 11-16

IN THE SUPREME COURT OF FLORIDA

SHIRLEY GAYLE HORNER,

Petitioner,

vs. : Case No. 79,840

STATE OF FLORIDA,

Respondent. :

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

INITIAL BRIEF OF PETITIONER ON THE MERITS

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TENTH JUDICIAL CIRCUIT

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PRELIMINARY STATEMENT

This is an appeal from the Twentieth Circuit. Three cases were consolidated for purposes of appeal. The record on appeal will be designated by each appellate case number from the Second District Court *of* Appeal and will be referred to as "R" followed by the appropriate page number. The defendant is the petitioner/appellant and will be referred to as the petitioner.

STATEMENT OF THE CASE AND FACTS

The State Attorney of the Twentieth Judicial Circuit in and for Charlotte County, filed informations against Petitioner in three separate cases. In case number 91-1818, the information filed on September 8, 1983 charged Shirley Horner with obtaining property in return for a worthless check, in violation of Section 832.05(4), Florida Statutes (1983). (R52) In case number 91-1802, the information filed on August 10, 1988 charged Shirley Horner with seven counts of obtaining property by worthless check, in violation of Section 832.05(2), Florida Statutes (1989). (R52-56) In case number 91-1813, the information filed on August 10, 1988 charged Shirley Horner with grand theft in violation of Section 812.014, Florida Statutes (1989). (R52) All counts in each of the three cases are third degree felonies punishable by a term of imprisonment not to exceed five years, Section 775.082(3)(d), Florida Statutes (1983).

Petitioner entered a plea on all three cases and was originally sentenced to 18 months imprisonment followed by 3 1/2 years probation concurrent on each case. (R72 in case 91-1813) Petitioner pled no contest to the amended violation of probation affidavits in 91-1818 (lower case no. 83-258), 91-1802 (lower case 88-386) and 91-1813 (lower case 88-385). (R17,18) On May 17, 1991, Petitioner was sentenced in 91-1813 to 3 1/2 years imprisonment with credit for time served followed by one year probation. (R33,60) As a condition of probation, Petitioner was ordered to report to the Bradenton Restitution Center. (R33) In case 91-1818, Petitioner was

sentenced to 3 1/2 years imprisonment concurrent with 91-1813 followed by one year probation to run consecutively to the probation in 91-1813. (R34) In case 91-1802 Petitioner was sentenced as follows: Count I, 5 years probation consecutive to the probation in 91-1818 and 91-1813; Count 11, 5 years probation to run consecutively to all other probation: Count III, 5 years consecutive probation: Count IV, 5 years consecutive probation; Count V, 5 years concurrent probation: Count VI, 5 years concurrent probation: Count VII, 5 years concurrent probation. (R36-38, 62, 63 in case no. 91-1802)

Petitioner timely filed her notice of appeal on May 31, 1991, on all three cases. (R64,65 in 91-1802; R72 in 91-1818; R63, 64 in 91-1813) On April 24, 1992, the Second District Court of Appeal held it was not error to impose consecutive terms of probation which resulted in all but one probationary period not commencing upon Horner's release from prison. Horner V. State, 597 So.2d 920 (Fla. 2d DCA 1992). Since there was no time gap between incarceration and probation, where Petitioner was under no form of supervision, the Second District Court affirmed the sentence and announced conflict with Lanier v. State, 504 So.2d 501 (Fla. 1st DCA 1987), and Washinston V. State, 564 So.2d 563 (Fla. 1st DCA 1990).

SUMMARY OF THE ARGUMENT

If probation is imposed subsequent to imprisonment on a particular count, or in one sentencing event, the probation must begin immediately upon a person's release from prison. In the instant case the trial court erred by imposing consecutive probation terms which created an impermissible gap between the prison term and the time probation was to begin on all but the first term or probation.

ARGUMENT

ISSUE I

WHETHER THE TRIAL COURT ERRED BY IMPOSING CONSECUTIVE PERIODS OF PROBATION THAT CREATED A TIME GAP BETWEEN RELEASE FROM INCARCERATION AND COMMENCEMENT OF PROBATION,

The trial court used a creative sentencing scheme to include a total of twenty two years probation following a 3 1/2 year term of incarceration. Three cases, 91-1802, 91-1813 and 91-1818 were before the court for one sentencing event on a violation of probation. The court imposed 3 1/2 years imprisonment on two cases, 91-1813 and 91-1818 followed by consecutive one year terms of probation. The ultimate result being that all of the consecutive terms of probation, with the exception of the first one, did not immediately follow the incarcerative portion of the sentence.

Probation is designed primarily as an alternative to incarceration to be used where a person is not likely to repeat a criminal course of conduct. §948.01(3) Fla. Stat. (1989). A judge derives authority to impose probation following incarceration solely from section 948.01 (8) Florida Statutes (1989). This section, which allows for the imposition of probation following incarceration, requires that the probation commences immediately upon a defendant's release from prison. The judge in the instant case imposed a sentence where there was a time gap between the release of petitioner from prison and the commencement of the consecutive one year term of probation and the five year terms of probation. The first one year term of probation is the only one that began immediately upon Petitioner's release from incarceration.

The court in Washinston v. State, 564 So.2d 563 (Fla. 1st DCA 1990) held that a gap in time before the commencement of probation is not allowed. In Washinston, a sentence of 4 1/2 years imprisonment followed by two consecutive six month terms of probation was not allowed, because the second probationary term did not begin upon Washington's release from prison. The case was remanded for resentencing to run the probationary terms concurrently. The sentencing on the first two cases in the instant case is identical to Washington and should be reversed. There was no incarceration imposed on the third case in this appeal but it also should be reversed because it was part of the same sentencing where incarceration was imposed.

There is no authority to impose probation after incarceration in one sentencing event where the probation does not begin immediately upon a defendant's release from prison. Judge Altenbernd noted this in the Second District Court of Appeal opinion in the instant case, even though he incorrectly used this reasoning to expand the sentencing patterns allowed by the statute.

> We see no logical reason why the legislature would authorize these consecutive terms of probation if the incarceration were imposed in only one of the cases, but would prohibit these consecutive terms of probation if the incarceration were imposed concurrently in two cases.
> fn5 Indeed, if the trial court had not imposed a split sentence including a concurrent 3 1/2 year term of incarceration in case one, it could have sentenced the defendant to yet another 5 year term of probation.
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> (Text of 597 So.2d 920, 921 (Fla. 2d DCA 1992)

A close reading of section 948.01(8) Florida Statutes (1989) does not allow for the sentencing scheme Judge Altenbernd indicates in footnote 5 as being permissible. The legislature did not allow for consecutive terms of probation in any situation where probation follows incarceration.

A fundamental principle of Florida law is that penal statutes must be strictly construed according to their letter. Perkins v. State, 576 So.2d 1310, 1312 (Fla. 1991). The Second District Court of Appeal allowed the sentence on Petitioner because they interpreted the statute to not allow a period of complete freedom between incarceration and probation. Section 948.01 (8) Florida Statutes (1989) does not mention complete freedom but does say the probation following incarceration must commence immediately. The

Second District did not strictly interpret the letter of the law as the First District Court of Appeal did in Washinston. In order for the sentence in the instant case to be legal, the periods *of* probation must be concurrent so they would commence immediately upon Petitioner's release from incarceration.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

SHIRLEY GAYLE HORNER,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

Case Nos. 91-01802
91-01813
91-01818

CONSOLIDATED

Opinion filed April 24, 1992.

Appeal from the Circuit Court for Charlotte County; Darryl C. Casanueva, Judge.

James Marion Moorman, Public Defender, and Julius Aulisio, Assistant Public Defender, Bartow, for Appellant.

Robert A. Butterworth, Attorney General, Tallahassee, and William I. Munsey, Jr., Assistant Attorney General, Tampa, for Appellee.

ALTENBERND, Judge.

The defendant, Shirley Gayle Horner, appeals the sentences she received on May 17, 1991, on revocation of her

probation in three cases. In total, she received 3 1/2 years' incarceration and 22 years' probation, As a condition of probation, she was required to spend up to 22 years at the Bradenton Probation and Restitution Center. We affirm the period of incarceration and the term of probation, but strike the condition of probation which requires Ms. Horner to spend an extended term at the restitution center.

The three cases on appeal involve numerous thefts, all third-degree felonies. Case one concerns a worthless check for $167 given to a grocery store in 1983.[1] Case two concerns a theft of $300 in February 1988.[2] Case three concerns seven worthless checks, totalling $3,871, also written in February 1988.[3] In November 1988, Ms. Horner received concurrent split sentences of incarceration followed by probation in these cases.

Apparently, Ms. Horner subsequently wrote additional worthless checks. As a result, the state sought a revocation of her probation. Ms. Horner pleaded no contest to the alleged

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[1] No. 91-01818, on appeal from State v. Horner, No. 83-258-CF-A-DCC, Circuit Court of the 20th Judicial Circuit, Charlotte County, Florida. Our record on appeal is somewhat limited. We have no information about the proceedings in this case between 1983 and 1988. We assume that the defendant elected sentencing under the guidelines for this offense in order to avoid a more severe sentence.

[2] No. 91-01813, on appeal from State v. Horner, No. 89-385-CF-A-DCC, Circuit Court of the 20th Judicial Circuit, Charlotte County, Florida.

[3] No. 91-01802, on appeal from State v. Horner, No. 88-386-CF-A-DCC, Circuit Court of the 20th Judicial Circuit, Charlotte County, Florida.

violations. At the revocation hearing in May 1991, the trial court sentenced Ms. Horner to concurrent terms of 3 1/2 years' imprisonment in cases one and two. The prison sentences were to be followed by a l-year probationary term for case two and a consecutive l-year term of probation for case one. These probationary periods were to be followed by four consecutive 5-year terms of probation in case three.[4] As a condition of each term of probation, the defendant was sentenced to report to the Bradenton Probation and Restitution Center within 24 hours of release from prison. It is clear that the trial court intended for Ms. Horner to spend up to 22 years at the restitution center, but it also expected she would petition for release from this condition after a much shorter period.

The defendant raises three issues concerning this sentencing structure. First, she challenges the year of probation in case one because that split sentence was interrupted by the year of probation in case two. She maintains that this creates an unauthorized gap between prison time and probation. Her argument is supported by Lanier v. State, 504 So. 2d 501 (Fla. 1st DCA 1987), and Washington v. State, 564 So. 2d 563 (Fla. 1st DCA 1990).

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[4] She also received three additional terms of concurrent probation on the remaining counts in case three. Those terms do not affect our analysis.

We recognize that section 948.01(8), Florida Statutes (1989), requires a period of probation to "commence immediately upon release of the defendant from incarceration" whenever a "split sentence" is imposed. We interpret this provision to preclude a period of complete freedom between incarceration and probation. Massey v. State, 389 So. 2d 712 (Fla. 2d DCA 1980) (90-day jail sentence could not be served in weekend increments of "intermittent incarceration"). Under the guidelines, a trial judge is frequently obligated to sentence a defendant on several counts or several separate informations at one sentencing hearing. See Clark v. State, 572 So. 2d 1387 (Fla. 1991). We see no logical reason why the legislature would authorize these consecutive terms of probation if the incarceration were imposed in only one of the cases, but would prohibit these consecutive terms if the identical incarceration were imposed concurrently in two cases.[5] Since there is no gap between the incarceration and the probation imposed at this sentencing hearing, we affirm this aspect of the sentencing method and announce conflict with Lanier and Washington.[6]

Second, the defendant argues that her stay at the Bradenton Restitution and Probation Center cannot last 22 years. She is correct. Bradenton Restitution and Probation Center is a

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[5] Indeed, if the trial court had not imposed a split sentence including a concurrent 3 1/2-year term of incarceration in case one, it could have sentenced the defendant to yet another 5-year term of probation.

[6] See also Latham v. State, 17 F.L.W. D781 (Fla. 1st DCA Mar. 17, 1992).

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Robert Butterworth, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4730, on this 21 day of October, 1992.

Respectfully submitted,

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