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SID J. WHITE

MAY 8 1992

CLERK SUPREME COURT

By _____
Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

SHIRLEY HORNER, :
 :
 Petitioner, :
 :
 vs. :
 :
 STATE OF FLORIDA, :
 :
 Respondent ■ :

Case No. 79840

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

BRIEF OF PETITIONER ON JURISDICTION

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

JULIUS AULISIO
ASSISTANT PUBLIC DEFENDER
FLORIDA BAR NUMBER 0561304

Public Defender's Office
Polk County Courthouse
P. O. Box 9000--Drawer PD
Bartow, FL 33830
(813) 534-4200

ATTORNEYS FOR PETITIONER

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STATEMENT OF THE CASE AND FACTS

Petitioner entered a plea on three separate cases and was sentenced to eighteen months prison followed by 3 1/2 years probation concurrent on each case. There were a total of eight counts of obtaining property by worthless check and one count of grand theft. Appellant subsequently entered a plea on all three cases to violating her probation. 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 1-year probationary term for case two and a consecutive 1-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. As a condition of probation, the defendant was sentenced to report to the Bradenton Probation and Restitution Center.

On April 24, 1992, the District Court of Appeal, Second District, reversed the placement in the restitution center from all of the probationary periods other than the first year in case two. The court further held, it was not error to impose consecutive terms of probation, all of which did not commence immediately upon Horner's release from prison. Since there was no gap between incarceration and probation the court affirmed the sentencing scheme and announced conflict with Lanier v. State, 504 So.2d 501 (Fla. 1st DCA 1987), and Washington v. State, 564 So.2d 563 (Fla. 1st DCA 1990) .

SUMMARY OF THE ARGUMENT

The **decision** of the Second District Court of **Appeal** permitting a time gap in the **commencement** of a probationary period **and** the **end** of incarceration is **in conflict** with the **First District Court** of Appeal.

ARGUMENT

ISSUE ONE

THE OPINION OF THE **SECOND** DISTRICT COURT OF **APPEAL** IS IN DIRECT CONFLICT WITH A DECISION OF ANOTHER DISTRICT COURT OF **APPEAL**.

In **its** opinion in the present case the Second District Court of Appeal held, that consecutive terms of probation which did not commence immediately upon the **release** from prison **was** permissible because **there was** no **gap** between **the** incarceration and the commencement of the **first** period of **probation**. In reaching this conclusion **the** Second District Court of **Appeal** announced conflict with **the** First District Court of Appeal in Lanier v. State, 504 So.2d 501 (Fla. 1st DCA 1987), and Washinston v. State, 564 So.2d 563 (Fla. 1st DCA 1990).

CONCLUSION

This Court should take conflict jurisdiction of this cause and reverse the decision of the Second District Court of Appeal.

APPENDIX

PAGE NO.

1. Second District Court of Appeal Opinion
filed April 24, 1992.

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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

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.

~~No. 91-01813, on appeal from~~ State v. Horner, No. 88-385-CF-A-DCC, Circuit Court of the 20th Judicial Circuit, Charlotte County, Florida.

~~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 1-year probationary term for case **two** and a consecutive 1-year term of probation for **case —**. 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).

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. See 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. 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

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.

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

Department of Corrections center. Placement in such a restitution center may not exceed 364 days. § 921.187, Fla. Stat. (1989).⁷ Thus, this condition of probation is appropriate for the first 1-year term of probation. This condition of probation, however, is stricken from the sentences imposed in case one and case three.

Finally, the defendant argues that the Bradenton Restitution and Probation Center is a variety of imprisonment which can only be imposed within the guidelines to the extent that the guidelines authorize imprisonment or incarceration. Our record contains no evidence concerning the living conditions of participants in that program.

We understand that "probation and restitution centers" are community-based facilities where probationers "who have violated their terms or conditions may be required to reside while working, receiving treatment, or attending school."

§ 944.026 (1)(c), Fla. Stat. (1991). The enunciated purpose of these facilities "is to provide the court with an alternative to committing offenders to more **secure** state correctional institutions and to assist in the supervision of probationers."

§ 944.026 (1)(c), Fla. Stat. (1991). **The** legislature intends that programs be imposed for a limited term "as a condition of

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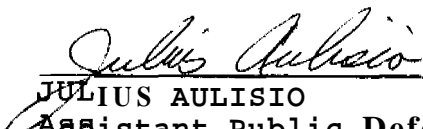
Placement in a county residential probation facility may be imposed for a period **up to 3 years**. § 921.187(d), Fla. Stat. (1989). From our record, it does not **appear** that the Bradenton Restitution and Probation Center is classified as a county facility.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to William I. Munsey,
Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4730, on
this 10th day of May, 1992.

Respectfully submitted,

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT
(813) 534-4200



JULIUS AULISIO
Assistant Public Defender
Florida Bar Number 0561304
P. O. Box 9000 - Drawer PD
Bartow, FL 33830

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