DA 3-5-93 047

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IN THE SUPREME COURT OF FLORIDA
TALLAHASSEE, FLORIDA

SHIRLEY GAYLE HORNER,

Petitioner,

vs. Case No. 79,840

STATE OF FLORIDA,

Respondent.

DISCRETIONARY REVIEW FROM THE
FLORIDA DISTRICT COURT OF APPEAL
SECOND DISTRICT
IN LAKELAND, FLORIDA

SECOND BRIEF OF RESPONDENT ON CERTIFIED CONFLICT

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STATEMENT OF THE CASE AND FACTS

The opinion below is reported as Horner v. State, 597 So.2d 20 (Fla. 2d DCA 1992). There the Second District has certified 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). On or about June 2, 1992, your undersigned filed a brief on certified conflict. This Court, on September 28, 1992, rendered an Order Accepting Jurisdiction and Setting Oral Argument for Friday, March 5, 1993.

SUMMARY OF THE ARGUMENT

Respondent contends that Ms. Horner's probation has begun immediately upon her release from prison. There is no impermissible **gap** between the prison term and the time probation was to begin. Why? Because the probationary terms are laddered and/or staggered. In other words, there is no period of complete freedom between incarceration and probation. Each and every probationary term is a restraint on the freedom of Ms. Horner. And, a Probation and Restitution Center is an "in-house" state-based facility (R 27) where Ms. Horner might learn not to pass bad checks.

Petitioner argues that the consecutive terms of probation [which follow the initial term of probation] are nullities because they do not immediately follow the incarcerative portion of the sentence. Respondent does not agree that these future probationary terms are an impermissible gap between the prison term and the time probation is to begin. Ms. Horner is to be serving unbroken probationary terms. And, Ms. Horner has not been enlarged to "complete freedom". Why? Because Ms. Horner is to report to the residential probation and restitution center.

There is no "gap" in probation. Probation has commenced with a condition that reporting be made within 48 hours. And, there is no "gap" between the probationary terms. The probationary terms are bridged. Simultaneous to the expiration of the initial probationary term is the birth of **the** following consecutive probationary term. In other words, when the first

probationary term comes to an end and/or expires, there is an automatic roll over into the consecutive probationary term. As a matter of practicality, it was incumbent upon Judge Casanueva to dispose of all these offenses in this consolidated sentencing hearing. Also, there was no objection to this sentencing scheme; and, as such, the better practice as recognized in Mitchell v. State, 594 So.2d 823 (Fla. 1st DCA 1992) would have been to have had the trial court review the claim pursuant to Fla.R.Crim.Pr. 3.800(a).

ARGUMENT

ISSUE ON CERTIFIED CONFLICT

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

(As Stated by Ms. Horner)

Ms. Horner entered a plea on three informations focusing on passing bad checks. She was originally sentenced to an 18-month incarceration to be followed by 3 1/2 years probation concurrent on each count. Thereafter, Ms. Horner pled no contest to an amended violation of probation complaint. (R 17, 18) At that time, Judge Casanueva sentenced Ms. Horner in Charlotte Case No. 91-1813 to 3 1/2 years imprisonment with credit for time served to be followed by one (1) year probation. (R 33, 60) As a condition of probation, Ms. Horner was to report to the Bradenton Restitution Center within 48 hours of her release and to benefit from their services until full payment of restitution. (R 33, 48, 62). In Charlotte Case No. 91-1818, Ms. Horner was sentenced to 3 1/2 years imprisonment concurrent with Charlotte Case No. 91-1813 followed by one (1) year probation to run consecutive to the probation pronounced in Charlotte Case No. 91-1813 (R 34) As a condition of probation, Ms. Horner was ordered to report to the Bradenton Restitution Center within 48 hours of her release from prison and remain there until she satisfies full restitution. (R 34). In Charlotte Case No. 91-1802, Ms. Horner was sentenced on Count I to five years probation consecutive to the probation in Charlotte Case Nos. 91-1813 & 91-1818 and to report to the

Bradenton Restitution Center within 48 hours of her release; Count II to three years probation to run consecutive to the above two cases with the same conditions; Count III to five years probation to run consecutive to the above two probations with the same conditions; Count IV to five years probation to run consecutive to the above two probations with the same conditions; Count V to five (5) years probation to run concurrent to the previously imposed probation with the same conditions; Count VI to five years probation concurrent to the previously imposed probation with the same conditians; Count VII to five (5) years probation to run concurrent with the previously imposed probation with the same conditions. (R 36-38)

The Fifth District first addressed the claim in Sanchez v. State, 538 So.2d 923 (Fla. 5th DCA 1989), rehearing denied Feb. 28, 1989. There Felix Sanchez was found guilty of burglary and dealing in stolen property. He was sentenced by the trial court to two (2) years community control followed by three (3) years probation on each count, to run consecutively. In other words, Mr. Sanchez was to first serve community control for two (2) years to be followed by three(3) years probation and then be recalled to serve another two (2) year term of community control followed by three (3) years probation. Mr. Sanchez asserted that his sentence was flawed because the imposition of an "interrupted sentence" is not permitted under Florida law. There the "State" argued that this is not an "interrupted sentence". Why? Because the trial court imposed two consecutive terms of community control followed by two (2) consecutive terms of probation. In

other words, the trial court imposed four (4) years of community control followed by six (6) years probation. The Fifth District was unable to discern the trial court's intention from the record on appeal. Thus, the sentences were vacated for resentencing with a direction for the trial court to indicate the sanction imposed for each offense.

At bar, the consecutive probations do not create an impermissible gap in the time probation was to begin. In the opinion below, Judge Altenbernd addresses the sentencing structure. The initial challenge is before this Court. Ms. Horner excepted to the year of probation in Charlotte Case No. 91-1818 because that split sentence was interrupted by the year of probation in Charlotte Case No. 91-1813. Ms. Horner's argument was that this created an unauthorized gap between prison time and probation. Judge Altenbernd recognized conflict of holdings with Lanier v. State, 504 So.2d 501 (Fla. 1st DCA 1987) and Washington v. State, 564 So.2d 563 (Fla. 1st DCA 1990). In the farmer, the First District held that when Michael Lanier was given a "split sentence", the non-incarcerative portion of the sentence [probation] must immediately follow the trial prison sanction. Thus, the First District found error in imposing a probationary term of imprisonment The First District noted that Florida's statutory scheme did not authorize intermittent sentences and that these exists a policy interest in having sentences served in a continuous uninterrupted period. Three years later in Washington v. State. 564 So.2d 563 (Fla. 1st DCA 1990), the First District reached for this claim in an Anders v.

California, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967) review. Again, the First District found that the sentencing pronounced by the trial court was not authorized by statute, The practical effect of the sentencing pronounced in Claudia Washington's case was to create an unauthorized gap between prison time and probation in regard to one of the sentences. The First District pointed to §948.01(8), Fla.Stat. (1987) which reads: "The period of probation ... shall commence immediately upon the release of the defendant from incarceration, whether by parole or gain-time allowances," (emphasis supplied) The First District certified the following question as a matter of great public importance:

> **WHEN IMPOSING A SENTENCING SCHEME WHICH INVOLVES INCARCERATION AND PROBATION, MAY THE TRIAL COURT IMPOSE CONSECUTIVE PERIODS OF PROBATION WHEN THE RESULTING PERIOD OF COURT CONTROL WILL CREATE A TIME GAP BETWEEN RELEASE FROM INCARCERATION AND COMMENCEMENT OF PROBATION IN REGARD TO ONE SENTENCE.**
>
> **(Text of 564 So.2d at 564)**

Regretfully, there was no appearance from the Office of the Attorney General in the First District; and, the Certified Question was not prosecuted to this Court, The First District recognized the problem not contemplated by the statute and recognized that the question was close in resolution.

The Second District has resolved this question; and, recognized conflict. The "State" suggests that resolution of the conflict might begin with State v. Savage, 589 So.2d 1016 (Fla. 5th DCA 1991). There, the Fifth District discusses the differences between "related" and "unrelated" sentencing orders.

There, James Savage pled guilty in **1985** to a Brevard County case of two counts of battery on a law enforcement officer; and, in that same year [1985], James Savage pled guilty to a separate Brevard County case to one count of grand theft and one count of burglary. The sentence in each case consisted of three years' imprisonment to be followed by one year of probation--to run concurrent to each other. While imprisoned in Baker County, Florida, James Savage was convicted of one count of an inmate in possession of contraband. He was sentenced to 30 months' imprisonment consecutive to any sentence being served. James Savage was released from imprisonment in **1988;** and, 23 **days** later he was arrested far violation of probation [he had failed to report to his probation officer within 72 hours of release][1]. Mr. Savage, on **the** basis of this arrest, was prosecuted for the murder of Barbara Ann Barber. Ms. Barber's family sued the Florida Department of Corrections for releasing him too soon; and, the Department defended by urging that he had served his sentence and was not on probation. ***See,*** Savage v. State, 588 So.2d 975, 978 (Fla. **1991).** This **was** a matter of consequence because if Mr. **Savage** were on probation, **the** police could have perfected a warrantless arrest; and, Mr. Savage urged that this

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[1] It wauld appear that James Savage was the target for **the** murder of the late Barbara Ann Barber; but, law **enforcement** at that time did not have sufficient evidence to arrest **him.** Mr. Savage was subsequently arrested and convicted. He did prosecute a direct appeal to this Court where his judgment of guilt was affirmed and sentence of death was vacated with directions that he be resentenced to 25 years imprisonment without possibility of parole. See, **Savage** v. State, 588 So 2d 975 (Fla. 1991), cert. denied sub nom. Russell Moore, aka James Hudson Savage v. Florida, ___ U.S. ___, 112 S.Ct. 1493, 117 L.Ed.2d **634** (1992).

triggered the exclusionary rule for statements made because he was not on probation. And, to clarify matters, Mr. Savage prosecuted a Fla.R.Crim.Pr. 3.850 to have his two Brevard sentences set aside. The trial court granted the post-conviction motion; and, the Fifth District reversed. State v. Savage, 589 So.2d 1016, 1018 (Fla. 5th DCA 1991). The Court noted: "Generally, imprisonment segments of consecutive sentences cannot be interrupted by probation. Additionally, the probationary portion of a split sentence 'must immediately' follow the prison sanction." [citations omitted]. However, Judge Cobb then distinguished between cases involving related sentencing orders and cases that involve unrelated sentencing orders. The latter sentencing orders are rendered at different times and in different counties where the defendant's intervening criminal activity cause the interruption of his sentence. Judge Cobb wrote:

> Simple logic would seem to dictate that, where a defendant is incarcerated in another jurisdiction, a probationary period from an unrelated sentence would be tolled since a probationary term should not be allowed to expire simply because a defendant has decided to incur new prison time as a result of a separate and distinct offense.
>
> Text of 589 So.2d at 1018

The trial court order granting post-conviction relief was reversed. At bar, the sentencing orders are related as they were rendered at one time by Judge Casanueva.

There are two new cases from the First District [neither of which are pending in this Court] which address the claim.

Mitchell v. State, 594 So.2d 823 (Fla. 1st DCA 1992) and Latham v. State, 596 So.2d 140 (Fla. 1st DCA 1991). In the former, the "State" confessed error where a sentencing plan imposed consecutive sentencing which interrupted the period of community control with a period of probation, The First District noted the allure to the State's position; wherein, it was argued that since this error was not brought to the trial court's attention, the proper remedy would be a Fla.R.Crim.Pr. 3.800(a) motion to correct illegal sentence. The First District held that incarcerative portions of the sentences must be served in a continuous period, to be followed immediately by the non-incarcerative portion of the sentence. And, in dicta, the First District agreed with the State:

> Although the patent sentencing error in this case requires reversal and remand for resentencing, judicial economy is not served by direct appeal of such sentencing errors readily correctable within the thirty day period for filing a notice of appeal. We agree with the state that better practice suggests such errors be brought to the trial court's attention, thereby obviating a direct appeal in many instances.
>
> Text of 594 So.2d at 824

At bar, the trial court determined that the Bradenton Restitution Center was an "in-house facility". (R 28) Ms. Horner did object to the sentencing because of the possibility that she might **be** incarcerated for an indefinite period of time. (R 47) But, the trial court noted that he was amenable to an early termination (47) and this was recognized below and **relief** granted. See, Horner v. State, 597 So.2d 920, 922 (Fla. 2d DCA 1992) [placement in a restitution center **may** not exceed 364 days]. On the claim

before this Court, Ms. Horner did not object. And, the judicial act sought for review was her placement in the Restitution Center until restitution was satisfied. **(R 65)** No Fla.R.Crim.Pr. **3.800** was filed.

And, in Latham v. State, **596** So.2d 140 (Fla. 1st DCA 1992), Judge Janos adhered to the First District position:

> Further, where a sentencing scheme involves periods of incarceration or community control followed by periods of probation, the statutes do not authorize intermittent periods of incarceration and probation. Rather, the incarcerative portions of the sentences must be followed immediately by the non-incarcerative portion of the sentence.
>
> Text of 596 So.2d at 142

Against this body of law, the Second District has affirmed Ms. Horner's period of incarceration and term of probation. There is no question but that the three bad check offenses committed by Ms. Horner were related to Charlotte County; related to each other at sentencing; but, unrelated to each other when committed. Judge Altenbernd recognized that under §948.01(8), Florida Statutes (1989) probation is to "commence immediately upon release of the defendant from incarceration" whenever a "split sentence" is imposed. Judge Altenbernd interpreted this provision to preclude a period of complete freedom between incarceration and probation. In other words, in cases such as this there is an intertwined dichotomy in which Ms. Horner has never enjoyed a period of complete freedom. The trial court found the restitution center to be an **in-house** facility. (R 27) The Court below did not disturb this finding.

Under the guidelines, it is appropriate for a trial judge to sentence a defendant on several counts or several informations at one sentencing hearing. There is no prohibition to the pronouncement of consecutive terms of probation. And, in this case there is no gap between the incarceration and the probation imposed by Judge Casanueva. Had there been a period of complete freedom, then the sentencing would have been illegal.

The "State" would ask this Court to note the certified question in Washington v. State, 564 So.2d 563, 564 (Fla. 1st DCA 1990) should have been [if prosecuted] answered in the affirmative; and, approve the opinion below.

CONCLUSION

WHEREFORE, based on the foregoing reasons, argument, and **authority, the "State" would ask this Court to make and render an opinion approving the decision below because Ms. Horner has not been enlarged to a "period of complete freedom" in the sentencing scheme.**

Respectfully submitted,

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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 Julius Aulisio, Esq., Assistant Public Defender, Office of the Public Defender, P.O. Box 9000--Drawer PD, Bartow, FL 33830 on this 10th day of November, 1992.

OF COUNSEL FOR RESPONDENT