IN THE SUPREME COURT OF FLORIDA

JEROME RIVERS,

Petitioner,

v. Case No. 80,141

STATE OF FLORIDA,

Respondent.

_____/

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

ANSWER BRIEF OF RESPONDENT ON THE MERITS

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SUMMARY OF THE ARGUMENT

The trial court did not impose a split sentence in the instant case. The defendant was before the trial court for sentencing on multiple cases and the trial court imposed a separate sentence for each offense, The defendant received a recommended guidelines sentence on one count, followed by consecutive probation on the remaining offenses. After the defendant violated his probation, he was properly sentenced to a term of incarceration on the underlying offense for which probation originally was imposed. 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 first count if he violates his probation on the second count because the original sentence was not a split sentence. The trial court did not err in sentencing the defendant to 4½ years incarceration when the defendant violated his community control.

ARGUMENT

ISSUE I

IF A TRIAL COURT IMPOSES A TERM OF PROBAT ON 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. (Issue as presented in Tripp)

In the instant case, the Second District Court issued a per curiam affirmance on the authority of State v. Tripp, 591 So.2d 1055 (Fla. 2d DCA 1991), *review of certified question pending,* Tripp v. State, No. 79,176 (Fla. 1992). For the following reasons, the Second District Court's decision should be affirmed.

First, the trial court did not impose a split sentence in the instant case. The defendant was before the trial court for sentencing on multiple cases and the trial court imposed a separate sentence for each offense. The defendant received a recommended guidelines sentence on one count, followed by consecutive probation on the remaining offenses. After the defendant violated his probation, he was properly sentenced to a term of incarceration on the underlying offense for which probation originally was imposed.

Second, the defendant is appealing from a plea of guilty to a charge of violation of community control. Since the defendant did not preserve the right to appeal any issues, his appeal should be dismissed. *See* Fla.R.App.P. 9.140 b); Graff v. State, 389 So.2d 333 (Fla. 5th DCA 1980). The defendant had the right to challenge the sentence when he was initially placed on

probation. Fla.R.App.P. 9.140(b)(1)(B). The defendant did not raise any challenge to the imposition of probation either before the trial court or on direct appeal in 1989 or in 1990; therefore, the instant claim has been waived. Wainwright v. Sykes, 433 U.S. 72, 53 L.Ed.2d 594, 97 S.Ct. 2497 (1977). Probation is a matter of grace rather than right and the trial court has broad discretion to grant as well as revoke probation. Robinson v. State, 442 So.2d 284 (Fla. 2d DCA 1983). Since the defendant failed to challenge the plea and probationary terms when originally imposed, he cannot challenge them now. Gallagher v. State, 421 So.2d 581 (Fla. 5th DCA 1982). *See also, Bashlor v. State,* 586 So.2d 488 (Fla. 1st DCA 1991) [Sentences imposed in violation of statutory requirements, which are to the benefit of the defendant and to which he agreed, may not be challenged after the defendant has accepted the benefits flowing from the plea, but has failed to carry out the conditions imposed on him.]

Third, the defendant in the instant case did not receive a split sentence. In Poore v. State, 531 So.2d 161 (Fla. 1988), this court set out the five sentencing alternatives available to trial courts in Florida:

1. confinement
2. a "true split sentence"
3. a "probationary split sentence"
4. a Villery[1] probationary sentence, and

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

5. straight probation.

In Poore, this Court held "if the defendant violates his probation in alternatives (3), (4), and (5), sect on 948.06(1) and Pearce[2] permit the sentencing judge to impose any sentence he or she originally might have imposed, with credit for time served and subject to the guidelines recommendation." Poore at 164. A "true" split sentence occurs when the judge sentences the defendant to incarceration but suspends a portion of the term. A "probationary" split sentence occurs when the judge sentences a defendant to a period of incarceration followed by a period of probation or community control, Franklin v. State, 545 So.2d 851 (Fla. 1989). In the instant case, the defendant was separately sentenced on multiple counts and informations, to wit:

> July 19, 1989 Case #89-8134 - Guilty pleas (two counts: delivery & possession/cocaine) Two years community control
>
> August 8, 1989 Case #89-11023 - Guilty plea (possession of cocaine w/intent to sell) Two years community control (concurrent to Case #89-8134)
>
> May 3, 1990 - Violation of Community Control
> 4½ years imprisonment, Count II
> [Defendant released on 2/5/91]
>
> Case #89-8134
> Count I, five (5) years probation, consecutive to prison term
>
> Case #89-11023
> Five (5) years concurrent probation, consecutive to prison term

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

On February 5, 1991, less than one year after the trial court sentenced the defendant to a 4½ year prison term in case #89-8134 (count 11), the defendant was released from custody. (R. 4). Less than two months after his release, the defendant was back before the trial court for violating his probation. As is evidenced by the following, the defendant was given yet another opportunity at rehabilitation, to wit:

> May 23, 1991 - Violation of Probation
> Two (2) years community control,
> concurrent
>
> July 25, 1991 - Violation of Community Control
> Case #89-8134 (Count I) and
> Case #89-11023
> Concurrent 4½ year prison term,
> followed by 3 years probation on each

A defendant convicted of multiple crimes may be sentenced to straight prison time on one count **and** consecutive probation on the remaining offenses. Upon a violation of probation, because the original sentence was not a split sentence, the defendant is not entitled to credit for time served. ***State v. Tripp, 591 So.2d 1055 (Fla. 2d DCA 1991), review of certified question pending; Tripp v. State, Fla. S.Ct. Case #79,176.*** In **Tripp,** the Second District Court envisioned the factual scenario presented in the instant case and stated:

> There may be situations in which a term of probation consecutive to a sentence of imprisonment would be a valid and appropriate sentence. There are other situations in which this sentencing method could be abused. It may be that there should be some limitation on a trial court's authority to impose a term of probation consecutive to a sentence of incarceration. We,

however, are unaware of any such restriction and are not authorized to create one.

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 first count when he is sentenced on the second count after violating his probation because such a sentence is not a split sentence. 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.

In State v. Perko, 588 So.2d 980 (Fla. 1991), the defendant 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.[3] The trial court declined to award this credit but the Fourth District reversed, This Court reversed, finding the District Court's reliance upon State v. Green, 547 So.2d 925 (Fla. 1989),[4] and Daniels v.

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

[4] 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;

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, 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." Thus, when a defendant has violated probation by committing a new offense, the sentence for that new offense should not include credit for time served and gain-time accumulated while the defendant was incarcerated for the earlier offense that underlie 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 was not entitled to credit for the time served on the burglary when being sentenced for the grand theft,

The Fourth and Fifth District Courts have similarly held that Defendants are not entitled to credit for time served in these types of cases. In Tripp, though finding Tripp was not

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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.

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

entitled to credit for time served on the burglary when he was sentenced on the grand theft after his probation was revoked, the Second 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 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.[6]

Since Green involves a split sentence, the opinion in Tripp by the Second District does not offend Green. *See also,* §948.06(2), Florida Statutes ["No part of the time that the defendant is on probation or in community control shall be considered as any part of the time that he shall be sentenced to serve.] As to the concerns about Lambert and abusive sentencing practices, this Court's recent opinion in Williams v. State, 594 So.2d 273 (Fla. 1992) gives guidance on the instant issue. In Williams, this Court held that multiple violations of probation were 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

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[6] 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.

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 these 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.

Applying the principles of Williams to the issue presented in the instant case alleviates the concerns af 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 hi3 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 far 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. 5 DCA 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 nothing in Green, Lambert or Poore to proscribe such a result.

This Court's statement in Poore announcing the five sentencing alternatives available in Florida meant that each

alternative was available per charge, not per charging instrument. Therefore, in this case, the first alternative of confinement was applied to one charge and the fifth alternative of straight probation was applied to the remaining charges. When the defendant's probation on one count 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 trial court sentenced the Defendant within the guidelines range and defendant was not entitled to any credit for time served because he had served no time on that count.

CONCLUSION

For the reasons cited by the District Court's opinion in Tripp and the cases cited therein, in addition to the reasons set forth by Respondent, Respondent asks this Court to affirm the District Court's opinion.

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, Assistant Public Defender, P. O. Box 9000, Drawer PD, Bartow, Florida this 10th day *of* November, 1932.

OF COUNSEL FOR RESPONDENT