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IN THE SUPREME COURT OF FLORIDA

JEROME RIVERS,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

Case No. 80,141

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

INITIAL BRIEF OF PETITIONER ON THE MERITS

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

JULIUS AULISIO
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ATTORNEYS FOR PETITIONER

TOPICAL INDEX TO BRIEF

TABLE OF CITATIONS

INA STATEMENT

Petitioner, Jerome Rivers, was the Appellant in the Second District Court of Appeal and the Defendant in the trial court. Respondent, The State *of* Florida, was the Appellee in the Second District Court of Appeal.

STATEMENT OF THE CASE AND FACTS

On May 24, 1989, the State Attorney for the Thirteenth Judicial Circuit, in and for Hillsborough County, filed an information in case number 89-8134, charging Appellant, Jerome Rivers, with delivery of cocaine in violation Section 893.13(1)(a), Florida Statutes (1987), and possession of cocaine in violation of Section 893.13(1)(f), Florida Statutes (1987). (R16,17) Count one allegedly occurred on April 4, 1989, and count two allegedly occurred on April 10, 1989. (R16) The State Attorney subsequently filed an information on July 5, 1989, in case number 89-11023, charging Appellant with possession of cocaine with intent to sell or deliver in violation of Section 893.13(1)(a), Florida Statutes (1989). (R47,48) These two cases were consolidated for purposes of appeal.

In 89-8134, Appellant entered a guilty plea and was sentenced to two years community control on July 19, 1989. (R25) Appellant also entered a guilty plea in case number 89-11023, and on August 8, 1989 was placed on a concurrent term of two years community control. (R56) At this point Appellant scored out to community control or 12-30 months prison on the guidelines. (R55)

An affidavit for violation of community control was filed on April 4, 1990. (R29,58) On May 3, 1990, Rivers entered an admission to the violation, and Judge Coe sentenced Rivers to 4 1/2 years imprisonment on Count 11 of 89-8134. (R33) The judge then imposed concurrent five year terms of probation on Count I in 89-

8134 and in 89-11023 which were to run consecutively to the 4 1/2 years prison term. (R31-34,59,60)

On May 23, 1991, probation was violated and Rivers was placed on concurrent terms of two years community control. (R36-37,61,62) Rivers was violated again, and on July 25, 1991, the court imposed concurrent sentences of 4 1/2 years prison followed by 3 years probation on Count I in 89-8134 and in 89-11023. (R41,42,66,67) Appellant timely filed his notice of appeal on August 2, 1991. (R90) On appeal, Appellant argued that the trial court erred by using a split sentencing scheme to exceed the guidelines on a revocation of probation. The Second District Court of Appeal affirmed the lower court on the authority of State v. Tripp, 591 So.2d 1055 (Fla. 2d DCA 1991), rev. of certified question pending, Tripp v. State, No. 79,176 (Fla.).

SUMMARY OF THE ARGUMENT

Once the trial court has imposed the maximum incarceration under the guidelines, no further incarceration may be imposed. This applies to all counts which are before the court at a single sentencing utilizing one scoresheet.

ARGUMENT

ISSUE I

WHETHER THE TRIAL COURT ERRED BY USING A SPLIT SENTENCING SCHEME TO EXCEED THE GUIDELINES WHICH DENIED JAIL CREDIT FROM THE FIRST OFFENSE AFTER A REVOCATION OF PROBATION ON TWO OTHER OFFENSES.

Appellant was serving two years community control concurrently on three counts arising out of two cases. When Appellant was violated he scored out to community control or 12-30 months on the guidelines, (R55) The maximum sentence under the guidelines, 4 1/2 years imprisonment, was imposed on Count II in case number 89-8134. Appellant was placed on consecutive probation on the two remaining counts. He was subsequently violated, and sentenced to 4 1/2 years imprisonment followed by 3 years probation. This sentence was illegal because Mr. Rivers has now received a total of nine years incarceration where he originally could have only received 4 1/2 years on the violation of community control.

Section 948.06(1), Florida Statutes (1989), provides that "If probation or community control is revoked, the court shall...impose any sentence which it might have originally imposed before placing the probationer on probation or the offender into community control." Appellant could have originally received a maximum of 3 1/2 years on the permitted range of the guidelines on each of the three counts concurrently. Florida Rule of Criminal Procedure 3.701(A) provides for a one cell bump after a revocation of

probation which means the maximum incarceration Petitioner could have received was 4 1/2 years.

When Petitioner's community control was violated, and he was sentenced to 4 1/2 years imprisonment, the court used up all of the prison sanction which was permitted under the guidelines. In Poore v. State, 531 So.2d 161 (Fla. 1988), the court held that upon a revocation of probation, a court may impose any sentence he originally might have imposed with credit for time served and subject to the guidelines recommendations. The sentence imposed in the instant case clearly did not comply with the guidelines recommendations as required by Poore.

All of Petitioner's offenses pending before the court for sentencing were scored on one scoresheet. Offenses from one scoresheet must be treated in relation to each other, and the total incarcerative period cannot exceed the guidelines without written reasons for departure. Fullwood v. State, 458 So.2d 170 (Fla. 5th DCA 1990). When sentencing on multiple counts, if the total prison sanction allowed by the guidelines is imposed on one offense but not on the others, none of the permitted total prison sanction will remain to be imposed in the event the defendant violates probation. Daniels v. State, 581 So.2d 970, 971 (Fla. 5th DCA 1991).

When the court sentenced Petitioner to 4 1/2 years imprisonment in the instant case, he used up the maximum allowable incarceration under the guidelines. Thus, when the court subsequently imposed 4 1/2 years imprisonment, this was an illegal sentence that could not have originally been imposed. Even with the

one cell bump up for a violation of probation, the maximum sentence Petitioner could have received was 4 1/2 years imprisonment. However, under Judge Coe's creative sentencing scheme, Petitioner has already received 9 years imprisonment with the possibility of more time to come if a future violation of probation occurs.

To allow this sort of sentencing scheme would render the guidelines meaningless and do away with uniformity in sentencing, In multi-count sentencing, a trial judge could circumvent the guidelines by revoking one probation at a time and imposing the maximum incarceration under the guidelines at each revocation. The guidelines presume that by the time a defendant is within the range calling for prison, he is not a good candidate for probation. See Fla.R.Crim.P. 3.701(b)(4). The trial courts should not be allowed to set up a situation where the likelihood of success on probation is small so they can later circumvent the guidelines by imposing successive incarcerations upon revocation.

CONCLUSION

In light of the foregoing reasons, arguments and authorities, Petitioner respectfully asks this Honorable Court to reverse the judgment and sentence of the lower court.

APPENDIX

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Katherine V. Blanco, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4730, on this 19 day of October, 1992.

Respectfully submitted,

JAMES MARION MOORMAN
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JA/lw

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

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

JEROME RIVERS,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

CASE NO. 91-02588

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opinion filed June 26, 1992.

Appeal from the Circuit **Court for** Hillsborough County; **Harry Lee** Coe, **111, Judge.**

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

Robert **A. Butterworth,** Attorney **General, Tallahassee, and Katherine V. Blanco, Assistant Attorney** General, **Tampa, for Appellee.**

PER CURIAM.

Affirmed on the authority of State v. Tripp, **591** So.2d **1055 (Fla. 2d DCA 1991),** rev. of certified question pending, Tripp v. State, No. **79,176 (Fla.).**

SCHOONOVER, C.J., **and DANAHY and CAMPBELL, JJ.,** Concur,

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