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IN THE SUPREME COURT OF FLORIDA

JAMES DICK,

Appellant,

v. Case No. 80,219

STATE OF FLORIDA,

Appellee.
_____/

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

ANSWER BRIEF OF RESPONDENT ON THE MERITS

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SUMMARY OF THE ARGUMENT

Respondent reasserts the argument presented in Brief of Respondent on Jurisdiction that this Court should not accept jurisdiction of this case since the certified question presented in State v. Tripp, 591 So.2d 1055 (Fla. 2d DCA 1991), is not an issue in this case. Moreover, Petitioner was properly sentenced within the guidelines and his argument that his sentence is contrary to the intent of the sentencing guidelines must fail.

In addition, Petitioner did not raise any objections to the conditions of probation imposed and consequently the trial judge was never given the opportunity to rule on any objections and thus Petitioner has not properly preserve his right to appeal these matters. The conditions imposed do not rise to the level of illegal conditions and consequently a contemporaneous objection was required.

ARGUMENT

ISSUE

WHETHER THE TRIAL COURT PROPERLY SENTENCED APPELLANT.

In the instant case, the Second District Court of Appeal issued a per curiam affirmance an 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) and Larson v. State, 572 So.2d 1368, 1371 (Fla. 1990). For the following reasons, the Second District Court's decision should be affirmed.

Petitioner is complaining about the fact that after he entered his plea of nolo contendere, the trial court imposed upon him a perfectly legal sentence falling within the guidelines. Consequently, there is no merit in the contention that Petitioner's sentence violates the intent of the sentencing guidelines.

At bar Petitioner entered a plea of no contest reserving his right to appeal "the legality of this sentence . . . and those matters which I have specifically reserved for appeal." (R42) At the hearing in which Appellant withdrew his not guilty plea and entered the no contest plea, it was discussed that Petitioner qualified for community control or 12-30 months and that is what was asked for. (R2-3) Specifically, the understanding was that Petitioner did not want to be sentenced to community control but rather he desired to be incarcerated for a

period of 12-30 months. (R3-8) At the sentencing hearing (R10-25) it was agreed by all parties that there was no problem and no objection with the scoresheet. (R11-13) The scoresheet indicated a recommended sentence of community control of 12-30 months in the Department of Corrections (DOC). (R33) The sentencing encompassed four separate and distinct cases, Nos. 91-241, 91-240, 91-244, and 91-294. (R6, 34-37, 47-51, 59-64,72-75) The sentences imposed were as follows: Case No. 91-241, 30 months in DOC as to Count I with 171 days of credit, followed by 10 years of probation, on Count 11, 30 months in DOC followed by 2 years of probation to run concurrent with Count I. (R16-19, 59-64) Case No. 91-244, 10 years probation to run concurrent with the above sentence as to Count 1 and 60 days in jail with credit for Count 11. (R19-21,72-75) Case No. 91-240, 10 years probation to sun concurrent with the above as to Count I and 60 days in jail with credit for Count 11. (R21-23,47-51) Case No. 91-294, 10 years probation to run concurrent with the above sentence as to Count I and 60 days in jail with credit for Count II. (R22-23,34-37) After the imposition of these sentences, Petitioner's defense counsel entered an objection to the sentences in Case Nos, 91-244, 91-240, and 91-294 stating these sentences were not consistent with the guidelines, that Petitioner should be given 30 months in the DOC in each and every sentence. (R23-24)

On appeal in the Second District, in an attempt to find error, counsel argued that the Second District Court of Appeal

should reconsider its holding in State v. Tripp, supra, or to alternatively again certify the same question as in Tripp to this Honorable Court. The Respondent respectfully disagreed with Petitioner's argument below and continues to disagree, reasserting that Petitioner's sentence was within the guidelines, was not illegal and there is no relief to be granted at this time.

In Tripp the Second District Court of Appeal found that jail credit had been improperly credited to time that had been served on a separate conviction. Id. at 1055. The Second District acknowledged in Tripp that its decision was following similar decisions out of the Fourth and Fifth Districts and also recognized that the sentencing method approved in Tripp "may conflict with the spirit of the sentencing guidelines . . ." Id. at 1056. (emphasis supplied) Based on this, Petitioner leveled a complaint looking to the future, asserting that if he "should be violated on his probation in case Nos. 91-294, 91-240, and 91-244" he would be precluded credit for time served in those cases. (Initial Brief of Appellant's, Second District Court of Appeal, p.4) There is no relief to be granted Petitioner at this point in time. Further, the district Court in Tripp closed by acknowledging that it was unaware of any restriction in imposing a term of probation consecutive to a sentence of incarceration and accordingly, it was not authorized to create such a restriction. Id. at 1057.

Given the above, that Petitioner's sentence is a permissible sentence falling within the guidelines, Respondent would urge that Petitioner's sentence be affirmed. The issue at bar is not ripe presently since no revocation of probation has yet taken place. The possibility that revocation of probation may occur in the future does not make this a justiciable issue.

Given the fact that **Tripp**, supra, is now pending before this Honorable Court, Respondent adopts all arguments made by Respondent in Tripp and a copy of the Answer **Brief** of Respondent **on** the Merits is attached hereto **as** an appendix.

As to the argument posed in Petitioner's brief, that certain conditions of his probation are invalid, Respondent again respectfully **disagrees**. Petitioner candidly admits no objection was made to the conditions of probation as imposed. (Petitioner's brief, p. 10) In Larson v. State, 572 So.2d **1368**, 1370 (Fla. 1990) this Honorable Court held the contemporaneous objection rule **is** inapplicable to conditions of probation "if those conditions in ~~fact~~ ~~are~~ illegal." (emphasis in original) (citation omitted). However, the Larson Court went on to explain that absent an objection, a defendant may appeal **a** condition of probation "only if it is so egregious as to be the equivalent of fundamental error." Id. at 1371. Such clearly is not the case at bar. The court in Larson further recognized that "[t]he mere fact that a certain probationary condition is subject to reversal on appeal once a proper objection is raised at trial **does** not necessarily mean it is illegal for the purposes at hand." Id.

(emphasis supplied) By Petitioner failing to voice any objections to the conditions, the trial court was prohibited from making any ruling on the abjections. Consequently, it appears that Petitioner has failed, by not objecting to these conditions when imposed, to properly preserve his right to appeal these conditions of probation.

At Petitioner's sentencing hearing, the trial court imposed as a special condition of probation that Petitioner is "not to use nor possess or be in any place that offers for use or sale or distribution any controlled substances defined by Chapter 893 Florida Statute." (R16) Additionally, the trial court stated that "[i]t's my understanding that he has a crack cocaine problem and that may have been the causation of these offenses." (R16) The condition that he not possess or use controlled substances as defined in §893, Fla. Stat. is patently valid. **Alvarez v. State, 593 So.2d 289** (Fla. 2d DCA 1992) and therefore there is no merit in the argument on appeal that this condition must be stricken especially in light of the fact that no objection was raised to this condition. Notwithstanding the above, Respondent acknowledges that in Alvarez it was found that a condition requiring a probationer not to associate with persons who use illegal drugs to be "too vague and capable of unintentional violation."

As a further condition of probation, since, according to the trial court, it appears on the facts that Petitioner has a secondary problem having to do with alcohol consumption, he was

ordered to undergo counseling and treatment for that as well as the drug problem. (R18) The court did not impose an absolute alcohol prohibition unless and until it became a realization that abstinence was the only way he could conquer his difficulties with alcohol. (R18,20) However, this determination of abstinence was left to the discretion of the probation officer. (R20) Respondent would urge that the condition relating to alcohol now attacked, especially under the facts at bar, is not illegal and not preserved. It is difficult to imagine why Petitioner would argue against his future rehabilitation by attacking this condition or the condition relating to controlled substances. While under Edmunds v. State, **559 So.2d 415** (Fla. **2d** DCA 1990), a condition regarding the consumption of alcohol is an invalid condition, Respondent would urge that it is not necessarily illegal given the finding that Petitioner has an alcohol problem and certainly it does not rise to the level of a condition that "is so egregious as to be the equivalent of fundamental error." Larson, supra. ~~See also~~ Alvarez, supra. Accordingly, Respondent submits this point **has** not been preserved for **appeal.**

Finally, **as** to that portion of the condition delegating to the probation officer the discretion to impose upon Petitioner a total abstinence as to alcohol, Respondent acknowledges that this may be an impermissible delegation of authority under Edmunds, supra, but again Petitioner never voiced an objection to this condition.

CONCLUSION

Based on the foregoing facts, arguments, and citations of authority, Respondent respectfully requests this Honorable Court affirm the judgment and sentence of the lower court.

Respectfully submitted,

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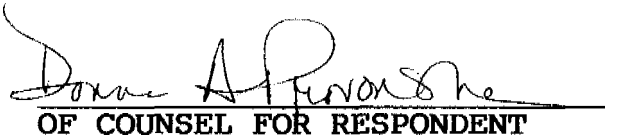
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to JENNIFER Y. FOGLE, Assistant Public Defender, P. O. Box 9000--Drawer PD, Bartow, Florida 33830, this 30th day of November, 1992.



OF COUNSEL FOR RESPONDENT

IN THE SUPREME COURT OF FLORIDA

JAMES DICK,

Appellant,

v. Case No. 80,219

STATE OF FLORIDA,

Appellee.

APPENDIX

Answer Brief of Respondent on the Merits, Timothy William Tripp vs. State of Florida, Case No. 79,176.

IN THE SUPREME COURT OF FLORIDA

TIMOTHY WILLIAM TRIPP,

Petitioner,

v. CASE NO. 79,176

STATE OF FLORIDA,

Respondent.

_____/

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

ANSWER BRIEF OF RESPONDENT ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

The Respondent agrees with the statement of the case and facst as stated by Petitioner.

SUMMARY OF THE ARGUMENT

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 1st count when he is sentenced on the 2nd count after violating his probation because such a sentence is not a split sentence.

ARGUMENT

ISSUE

IF A TRIAL COURT IMPOSES A TERM OF PROBATION 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.

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 1st count when he is sentenced on the 2nd count after violating his probation because such a sentence is not a split sentence. In the instant case, Petitioner pled guilty *to* burglary and grand theft. The guidelines called for up to 4½ years in Florida State Prison, (FSP . Petitioner was sentenced as follows:

1. burglary---4 years FSP
2. grand theft---4 years probation consecutive to FSP in count I.

After 10 months, Petitioner had served his 4 year sentence for burglary and began serving his 4 years of probation. He subsequently admitted to violating his probation, and it was revoked. At the revocation hearing, the guidelines called for up to 4½ years in prison.[1] The trial court believed it was bound *to* credit Petitioner with the 4 years "served" on the burglary, and

[1] Neither party nor the trial court considered the use of the one cell bump for sentencing after violating probation.

sentenced Petitioner on the grand theft to 4½ years with credit for the 4 years served on the separate offense of burglary. On appeal by the State, the 2nd District reversed finding Petitioner was not entitled to credit when being sentenced after revocation of his probation on the grand theft for the 4 years he served on the burglary. The 2nd District was correct in this holding. To do otherwise would be to reward Petitioner for violating hi5 probation. 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. As this Court stated in State v. Perko, 588 So.2d 980 (Fla. 1991), "... the opinion of the district court resulted in Perko being rewarded with a seduced sentence on the new drug offense solely because he previously had committed a grand theft." Perko at 982. Though Perko is not directly on point, it supports the District Court's holding that a defendant does not get credit for time served on one count when he subsequently violates his probation on another count and receives a prison sentence on that count.

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.[2] The trial court

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

declined to award this credit but the 4th District reversed. This Court reversed finding the District Court's reliance upon State v. Green, 547 So.2d 925 (Fla. 1989),[3] and Daniels v. 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, (in Perko the grand theft auto; in the instant case, the grand theft; in Green, the attempted sexual battery), 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." (In Perko, this would be the original imprisonment "served" an the grand theft; in the instant case, it would be any original imprisonment served on the grand theft, which there was none; in Green, it was the original 4½ years "served" on the attempted sexual battery.) This Court held that when a defendant has violated probation by committing a new offense, the sentence for that new offense should not include credit for time served

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[3] 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;
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 far 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.

and gain-time accumulated while the defendant was incarcerated for the earlier offense that underlay 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 is not entitled to credit for the time served on the burglary when being sentenced for the grand theft. Respondent has not overlooked the fact that at issue in Perko was Perko's being sentenced on the new crime, the drug offense. Tripp's sentence on the new crimes of trespass and the new burglary are not at issue in this case. However, presumably Perko was sentenced for all pending charges, including the new drug offense, under a single scoresheet yet this Court held Perko did not get credit for time served on one crime in the sentencing of another distinct crime. The same analysis applies to the instant case.

As set out in the 2nd District's opinion, the 4th and 5th District's have similarly held that Defendants are not entitled to credit for time served in these types of cases.[4] Though finding Tripp was not entitled to credit for time served on the burglary when he was sentenced on the grand theft after his probation was revoked, the 2nd 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

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

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.[5]

Since Green involves a split sentence, the instant opinion by the 2nd District does not offend Green. As to the concerns about ~~Lambert~~ and abusive sentencing practices, this Court's recent opinion in Williams v. State 17 FLW S81 (Fla. February 6, 1992), gives guidance on the instant issue. In ~~Williams~~, this Court held that multiple violations of probation was 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 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 there 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.
>
> Williams at 82.

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[5] 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.

Applying the principles of Williams to the issue presented in the instant case alleviates the concerns of 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 his 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 mey 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 for 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. 5DCA 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 nothin gin Green, Lambert or Poore to proscribe such a result.

Poore v. State, 531 So.2d 161 (Fla. 1988), sets out the 5 sentencing alternatives available to trial courts in Florida: 1. confinement 2. a "true split sentence" 3. a "probationary split sentence" 4. a Villery[6] probationary sentence, and 5. straight probation. "In Poore, this Court held "if the defendant violates his probation in alternatives (3), (4), and (5), section 948.06(1) and Pearce[7] permit the sentencing judge to impose any

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

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

PAGE(S) MISSING

CONCLUSION

For all the reasons cited by the District Court opinion and the cases cited therein, in addition to the reasons set forth by Respondent, Respondent asks this Court to affirm the District Court opinion and answer the certified question in the affirmative.

Respectfully submitted,

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I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to Andrea Norgard, Assistant Public Defender, P.O. Box 9000-Drawer PD, Bartow, Florida 33830, on this 18th day of February, 1991.

OF COUNSEL FOR RESPONDENT