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FILED
SID J. WHITE
JAN 25 1993
CLERK, SUPREME COURT
By _____ Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

PAUL R. COOK,

Petitioner,

v. CASE NO. 81,098

STATE OF FLORIDA,

Respondent.

_____/

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ON DISCRETIONARY REVIEW FROM
THE DISTRICT COURT OF APPEAL,
FIRST DISTRICT OF FLORIDA

PETITIONER'S BRIEF ON JURISDICTION

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

GLENNA JOYCE REEVES
ASSISTANT PUBLIC DEFENDER
LEON COUNTY COURTHOUSE
FOURTH FLOOR NORTH
301 SOUTH MONROE STREET
TALLAHASSEE, FLORIDA 32301
(904) 488-2458

ATTORNEY FOR PETITIONER
FLA. BAR #231061

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TABLE OF CITATIONS

IN THE SUPREME COURT OF FLORIDA

PAUL R. COOK,	:	
Petitioner,	:	
v.	:	CASE NO. 81,098
STATE OF FLORIDA,	:	
Respondent.	:	
_____	:	

PETITIONER'S BRIEF ON JURISDICTION

PRELIMINARY STATEMENT

Petitioner, as referred to in this brief, was the defendant in the trial court and appellant below. Respondent, the State of Florida, was the prosecuting authority.

The opinion of the District Court of Appeal is attached as Appendix "A". Petitioner's brief below is attached as Appendix "B".

STATEMENT OF THE CASE

Petitioner appealed to the District Court of Appeal, First District, the trial court's order denying him credit for the 4 1/2 year prison term he had previously served prior to his violation of probation. On appeal, petitioner posed the question:

> If a trial court imposes a term of probation consecutive to a sentence of incarceration on another offense, can jail time credit from the first offense be denied on a sentence imposed after the revocation of probation on the second offense? (R-5).

This issue is currently pending before this Court in Tripp v. State, Case No. 79,176. In his brief, petitioner had requested that the court stay its decision until the decision in Tripp was reached (B-8-90). The District Court rejected petitioner's claim by a per curiam affirmance, citing State v. Tripp, 591 So.2d 1055 (Fla. 2d DCA 1991), rev. pending, Case No. 79,176 (Fla.) ("A").

ARGUMENT ON JURISDICTION

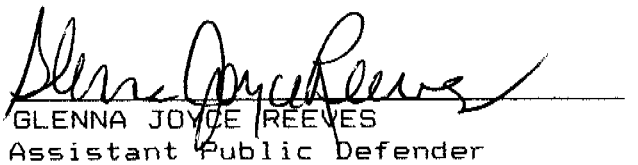
Under Jollie v. State, 418 So.2d 405 (Fla. 1981), this Court has jurisdiction to review a "citation PCA" where the cited case is pending review in this Court. This Court should accept jurisdiction in the present case since the issue herein is the same as that presented in State v. Tripp, 591 So.2d 1055 (Fla. 2d DCA 1991), rev. pending, Case No. 79,176 (Fla.).

CONCLUSION

Based on the authorities cited, petitioner requests this Court to exercise its discretionary jurisdiction in this case.

Respectfully submitted,

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT



GLENNA JOYCE REEVES
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(904) 488-2458

Attorney for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Robert A. Butterworth, Attorney General, by delivery to The Capitol, Plaza Level, Tallahassee, Florida, and a copy has been mailed to petitioner, Paul R. Cook, #565657, Calhoun Correctional Institution, Post Office Box 2000, Blountstown, Florida 32424, this 25th day of January, 1993.

GLENNA JOYCE REEVES

IN THE SUPREME COURT OF FLORIDA

PAUL R. COOK,	:	
Petitioner,	:	
v.	:	CASE NO. 81,098
STATE OF FLORIDA,	:	
Respondent.	:	
_____	:	

APPENDIX A

IN THE DISTRICT COURT OF APPEAL

FIRST DISTRICT, STATE OF FLORIDA

PAUL R. COOK,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED.

CASE NO. 92-54.

Opinion filed December 16, 1992.

Appeal from the Circuit Court for Leon County.
Judge William Gary.

Nancy A. Daniels, Public Defender, and Glenna Joyce Reeves, Assistant Public Defender, Tallahassee, for appellant.

Robert A. Butterworth, Attorney General, and Wendy S. Morris, Assistant Attorney General, Tallahassee, for appellee.

PER CURIAM.

AFFIRMED. State v. Tripp, 591 So.2d 1055 (Fla. 2d DCA 1991), rev. pending, Case No. 79,176 (Fla.); State v. Rogers, 540 So.2d 872 (Fla. 4th DCA 1989); Ford v. State, 572 So.2d 946 (Fla. 5th DCA 1990).

BOOTH, BARFIELD, and MINER, JJ., CONCUR.

IN THE SUPREME COURT OF FLORIDA

PAUL R. COOK,	:	
Petitioner,	:	
v.	:	CASE NO. 81,098
STATE OF FLORIDA,	:	
Respondent.	:	
_____	:	

APPENDIX B

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT OF FLORIDA

PAUL R. COOK,

Appellant,

v. CASE NO. 92-54

STATE OF FLORIDA,

Appellee.

_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE SECOND JUDICIAL CIRCUIT,
IN AND FOR LEON COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

GLENNA JOYCE REEVES
ASSISTANT PUBLIC DEFENDER
LEON COUNTY COURTHOUSE
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ATTORNEY FOR APPELLANT
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IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT OF FLORIDA

PAUL R. COOK,	:	
Appellant,	:	
v.	:	CASE NO. 92-54
STATE OF FLORIDA,	:	
Appellee.	:	
	:	

INITIAL BRIEF OF APPELLANT

PRELIMINARY STATEMENT

Appellant, as referred to in this brief, was the defendant below. Appellee, the State of Florida was the prosecuting authority.

The record on appeal consists of the record proper which will be referred to as "R", the sentencing hearing January 18, 1990, which will be referred to as "S", the violation of probation hearing held November 22, 1991, which will be referred to as "V" and the sentencing hearing held on December 5, 1991, which will be referred to as "T". The supplemental record on appeal will be referred to as "SR".

STATEMENT OF THE CASE AND FACTS

In Case No. 89-1086, appellant pleaded to Counts II, III and V, passing a worthless bank check, grand theft, and forgery (R-1-2,15-16). In Case No. 89-1676, appellant pleaded no contest to passing a worthless bank check (R-52,54-56). In Case No. 89-2402, appellant pleaded no contest to passing a worthless bank check (R-76,79-81). He was sentenced on these offenses on June 5, 1989, to three years probation on each case and each count, to run concurrently (R-15-16,54-56,79-81). Thereafter, appellant pleaded to one count of credit card fraud (89-4068) and to two counts of forgery and one count of grand theft (89-5033), as well as violations of probation in Case Nos. 89-1086, 89-1676, and 89-2402. At the sentencing hearing January 18, 1990, appellant was sentenced within the permitted range of the guidelines to 4 1/2 years Department of Corrections on Case Nos. 89-4068 and 89-5033 (S-12-13, SR-2-5,7). On Case Nos. 89-1086, 89-1676, and 89-2402, appellant's probation was revoked and he was placed on probation for a period of three years to run consecutive to the Department of Corrections' sentences (R-22-27,63-65,85-88; S-13-14).

At a violation of probation hearing November 22, 1991, it was found that appellant had violated the conditions of his probation in 89-1676, 89-1086, and 89-2402 (V-24). The trial judge sentenced him to 3 1/2 years in the Department of Corrections (T-12; R-34-48,71-74,93-96). Appellant's request that he

be given credit for the 4 1/2 year prison term he had previously served was denied (T-4-11).

Notice of appeal was timely filed (R-98).

SUMMARY OF THE ARGUMENT

Appellant must be given credit for time previously served on Case Nos. 89-4068 and 89-5033. This requirement is consistent with the spirit of the sentencing guidelines.

ARGUMENT

ISSUE PRESENTED

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 THE REVOCATION OF PROBATION ON THE SECOND OFFENSE?

On January 18, 1990, appellant was sentenced for multiple counts of several informations. The guidelines scoresheet at that time reflected 117 points or the 5 1/2 to 7 year range. The trial court imposed a sentence of 4 1/2 years imprisonment on Case Nos. 89-4068 and 89-5033. He imposed concurrent three year probationary terms on Case Nos. 89-1086, 89-1676 and 89-2402, to run consecutive to the incarceration previously imposed. Subsequently, when the probation on those cases was violated, the trial judge declined to give appellant credit for the 4 1/2 years he had previously served in prison. Appellant contends he is entitled to that credit and to deny him the credit violates the spirit of the sentencing guidelines as well as the opinions in Poore v. State, 531 So.2d 161 (Fla. 1988), Lambert v. State, 545 So.2d 838 (Fla. 1989), and State v. Green, 547 So.2d 925 (Fla. 1989).

In Poore v. State, supra at 165, the Supreme Court addressed the function of probation revocations under the guidelines and the policies for limitations on revocations. In Poore, the Supreme Court held that the court, upon a revocation of probation, may impose any sentence up to the maximum for which the defendant stands convicted, subject to credit for

time served and within the recommended guidelines range. In Poore, the Supreme Court expressly rejected the concept that a trial court could ignore the guidelines after a violation of probation in a probationary split sentence. The court noted:

> We stress, however, that the cumulative incarceration imposed after violation of probation always will be subject to any limitations imposed by the sentencing guidelines recommendation. We reject any suggestion that the guidelines do not limit the cumulative prison term of any split sentence upon a violation of probation. To the contrary, the guidelines manifestly are intended to apply to any incarceration imposed after their effective date, whether characterized as a resentencing or a revocation of probation. See Section 921.001(4)(a), Fla.Stat. (1987). They thus must be applied to the petitioner in this instance, albeit within the context of the previously imposed true split sentence.
>
> To hold otherwise would permit trial judges to disregard the guidelines merely by imposing a true split sentence, as provided in alternative (2). For example, in a case where the statutory maximum was 25 years and the guidelines range was 5 to 7 years, a trial court could impose a split sentence of 25 years, with the first 7 years to be served in prison and the remaining 18 suspended, with the defendant on probation. Upon violation of probation, the trial court then simply could order the incarceration of the defendant for the balance of the 18-year probationary period, notwithstanding any lesser recommended guidelines range. Such an analysis not only would defeat the purpose of the sentencing guidelines, but would destroy them all together. Obviously, this result never was intended when the guidelines permitted the probationary portion to exceed the recommended range.

Id. at 165. The rationale of Poore is equally applicable here.

The Fifth District in Fullwood v. State, 558 So.2d 168 (Fla. 5th DCA 1990), applied Poore to a case involving one information with three counts. The defendant therein had originally received straight probation on Counts I and II and a Villery sentence of probation preceded by 25 months incarceration as a condition of probation on Count III. The guidelines recommended 2 1/2 to 3 1/2 years incarceration. When the defendant violated his probation, the trial court sentenced the defendant to 22 to 24 months prison on Count II, modified probation on Count I and left Count III alone. The Fifth District held that the combined sentences of incarceration for Counts II and III, past and present, exceeded the guidelines range. The court noted:

> Since the guidelines require a sentence as to each offense and also require that the total sentence not exceed the guidelines range, Count III should have been considered in determining Fulwood's total sentence even though probation as to Count III was not revoked. In other words, the offenses from one scoresheet must be treated in relation to each other.

Id. at 170. The court held that since incarcerative portions of Counts II and III exceeded the maximum of the recommended range and since no written reasons for departure were given, the sentence was reversed and the cause remanded for resentencing.

Appellant contends that Fullwood is the correct approach. To do otherwise is to destroy the integrity of the sentencing guidelines and to defeat their purpose.

The potential for abuse is frightening if Poore, Lambert and Green are not held applicable here. Trial judges can easily circumvent the guidelines by stacking probationary periods and imposing the maximum prison time for each violation resulting in that total length of time being served would be far in excess of the permitted guidelines range. 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 Florida Rule of Criminal Procedure 3.701(b)(4). The trial court should not be permitted to set up situations where the likelihood of success on probation is small so that they can later avoid the sentencing guidelines by imposing successive incarcerations upon revocation. Neither should the trial court be permitted to devise games to avoid structures of the guidelines.

Appellant acknowledges that his position has been rejected by the Second District in State v. Tripp, 17 FLW D133 (Dec. 27, 1991 2nd Dist.). The Second District recognized, however, the potential for abuse in this situation and accordingly certified the issue to the Supreme Court. The issue is now pending before the Florida Supreme Court. Tripp v. State, Case No. 79,176. Appellant urges the Court to hold that he is entitled to credit. Alternatively, appellant requests the Court stay

its decision until the Florida Supreme Court's decision in Tripp.

CONCLUSION

For the reasons stated, appellant contends he is entitled to credit for the time previously spent in prison on Case Nos. 89-4068 and 89-5033.

Respectfully submitted,

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

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Attorney for Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by hand delivery to James W. Rogers, Assistant Attorney General, The Capitol, Tallahassee, Florida, and a copy has been mailed to appellant, this 31st day of March, 1992.

GLENNA JOYCE REEVES