097

IN THE SUPREME COURT OF FLORIDA

PAUL R. COOK,

Petitioner,

v. CASE NO. 81,098

STATE OF FLORIDA,

Respondent.

_____/

ON APPEAL FROM THE DISTRICT COURT OF APPEAL
FIRST DISTRICT OF FLORIDA

RESPONDENT'S BRIEF ON THE MERITS

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

WENDY S. MORRIS
ASSISTANT ATTORNEY GENERAL
FLORIDA BAR NO. 0890537

DEPARTMENT OF LEGAL AFFAIRS
THE CAPITOL
TALLAHASSEE, FL 32399-1050
(904) 488-0600

COUNSEL FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF CITATIONS

IN THE SUPREME COURT OF FLORIDA

PAUL R. COOK,

Petitioner,

v. CASE NO. 81,098

STATE OF FLORIDA,

Respondent.

_____/

RESPONDENT'S BRIEF

PRELIMINARY STATEMENT

Petitioner, PAUL R. COOK, defendant below, will be referred to herein as "Petitioner." Respondent, the State of Florida, will be referred to herein as "the State." References to the record on appeal will be by the use of the symbol "R" followed by the appropriate page number(s). References to the supplemental record on appeal will be by the use of the symbol "R2" followed by the appropriate page number(s). References to the January 18, 1990 sentencing hearing will be by the use of the symbol "S1" followed by the appropriate page number(s). References to the November 22, 1991 violation of probation hearing will be by the use of the symbol "V" followed by the appropriate page number(s). References to the December 5, 1991 sentencing hearing will be by the use of the symbol "S2" followed by the appropriate page numbers.

STATEMENT OF THE CASE AND FACTS

The State accepts Petitioner's statement of the case and facts as reasonably accurate.

SUMMARY OF ARGUMENT

This case should be remanded to the trial court for resentencing so that Petitioner may receive proper credit for time served under Tripp v. State, 18 Fla. L. Weekly S166 (Fla. Mar. 25, 1993), and so that the court may correct the illegal sentence of three and one-half years' incarceration, in lower court case numbers 89-1086, 89-1676 and 89-2402.

ARGUMENT

ISSUE

IF A TRIAL COURT IMPOSES A TERM OF PROBATION ON ONE OFFENSE CONSECUTIVE TO A SENTENCE OF INCARCERATION ON ANOTHER OFFENSE, CAN JAIL CREDIT FROM THE FIRST OFFENSE BE DENIED ON A SENTENCE IMPOSED AFTER A REVOCATION OF PROBATION ON THE SECOND OFFENSE.

On June 5, 1989, Petitioner was sentenced to three concurrent three-year terms of probation in case numbers 89-1086, 89-1676, and 89-2402 (R 19-20, 60-61, 82-83). On January 18, 1990, the trial court sentenced Petitioner on two new offenses, and the court violated him as to the three original offenses as follows: (1) In case numbers 89-4068 and 89-5033, Petitioner was sentenced to two concurrent four and one-half year terms of imprisonment (R 25, 66, 90; S1 12-13); and, (2) in case numbers 89-1086, 89-1676, and 89-2402, the trial court revoked Petitioner's probation, adjudicated him guilty of the underlying offenses, and again placed Petitioner on probation for a period of three years (R 26-27, 67-68, 88-89; S1 13-14). Petitioner's probationary terms were concurrent to each other but were consecutive to the four and one-half year terms of imprisonment imposed in case numbers 89-4068 and 89-5033 (R 26-27, 67-68, 88-89; S1 14). The five offenses were scored on a single scoresheet, pursuant to State v. Stafford, 593 So. 2d 496 (Fla. 1992) (R2 7). Petitioner's recommended range was five and one-half to seven years' incarceration, and his permitted range was four and one-half to nine years' incarceration (R2 7).

On November 22, 1991, the trial court found that Petitioner violated his probation for the second time in case numbers 89-1086, 89-1676 and 89-2402, and the trial court postponed sentencing in these cases (V 24). On December 5, 1991, the trial court revoked Petitioner's probation for the second time and sentenced him to three concurrent terms of three and one-half years' incarceration, in case numbers 89-1086, 89-1676 and 89-2402 (R 38-39, 73-74, 95-96; S2 11-12). The trial court gave Petitioner credit for 171 days time served (R 73; S2 11).

Petitioner contends that, when the trial court revoked his probation for the second time and sentenced him to three and one-half year terms of imprisonment in case numbers 89-1086, 89-1676 and 89-2402, he was entitled to credit for the four and one-half years' time served in case numbers 89-4068 and 89-5033, pursuant to Tripp v. State, 18 Fla. L. Weekly S166 (Fla. Mar. 25, 1993). The State agrees, contingent upon the Tripp decision becoming final without change. However, the State notes that Petitioner's three and one-half year sentence in case numbers 89-1086, 89-1676 and 89-2402, was a downward departure without written reasons from Petitioner's guidelines range of four and one-half to nine years' incarceration; therefore, the sentence was illegal under Ree v. State, 565 So. 2d 1329 (Fla. 1990); see also Fla.R.Crim.P. 3.701(d)(11). Upon remand, the trial court may impose any sentence within Petitioner's guideline range of four and one-half to nine years' incarceration with

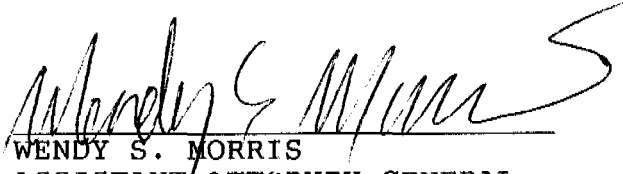
credit for the time served pursuant to Tripp. However, the trial court also may impose any sentence within the two higher cells i.e., up to a maximum of seventeen years' incarceration, as Petitioner twice violated his probation in case numbers 89-1086, 89-1676 and 89-2402, with credit for time served under Tripp.Williams v. State, 594 So. 2d 273 (Fla. 1992); Fla.R.Crim.P. 3.701(d)(14).

CONCLUSION

Based on the foregoing legal authorities and arguments, Respondent requests that this Honorable Court reverse and remand for resentencing.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



WENDY S. MORRIS
ASSISTANT ATTORNEY GENERAL
FLORIDA BAR NO. 0890537

DEPARTMENT OF LEGAL AFFAIRS
THE CAPITOL
TALLAHASSEE, FL 32399-1050
(904) 488-0600

COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Glenna Joyce Reeves, Assistant Public Defender, Second Judicial Circuit, Leon County Courthouse, Fourth Floor North, 301 South Monroe Street, Tallahassee, FL 32301, this 26th day of April, 1993.

Wendy S. Morris
Assistant Attorney General