IN THE SUPREME COURT OF FLORIDA

L. C. BRADLEY,

Petitioner,

vs. Case No. 81,672

STATE OF FLORIDA,

Respondent.

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

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ATTORNEYS FOR PETITIONER

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OTHER AUTHORITIES

STATEMENT OF THE CASE AND FACTS

On February 15, 1990, the State Attorney for the Thirteenth Judicial Circuit in and for Hillsborough County, Florida, filed two separate informations against the Appellant, L.C. BRADLEY, charging Mr. Bradley with two different robberies in violation of section 812.13(1) and (2)(c), Florida Statutes (1989), one which occurred on December 15, 1989, and the other which occurred on December 20, 1989 (R5, 6, 26, 27). On February 20, 1990, Mr. Bradley pled guilty to both charges and was sentenced to 7 years prison to be followed by 5 years probation with credit for 37 days served on each charge, said sentences to run concurrent (R7-11, 29-33). The guidelines recommended 5 1/2 to 7 years prison (R41, 42).

On December 4, 1991, Mr. Bradley, after serving 18 months in prison for the 7 years imposed, admitted violating his probation. The trial court, however, refused to give Mr. Bradley credit for the 7 years--time served plus gain time--and only credited Mr. Bradley for the actual time served upon resentencing. The trial court sentenced Mr. Bradley to 7 years prison on each charge, said terms concurrent, with credit for 190 days served (R17-21, 34-38, 65-74). The trial court denied Mr. Bradley's request for the full 7 years credit on December 11, 1991; and Mr. Bradley timely appealed that denial on December 30, 1991 (R12-16, 39, 40, 52, 75-84).

On April 14, 1993, the Second District Court of Appeal issued an opinion rejecting Mr. Bradley's request for the 7 years

credit based on the belief that the statute allowing a forfeiture of gain time took effect on October 1, 1989. Mr. Bradley had argued the appropriate statute had not become effective until September 1, 1990. The Second District Court of Appeal certified conflict with the Fourth District Court of Appeal which had held in Thomas v. State, 605 So. 2d 1286 (Fla. 4th DCA 1992), that the effective date of the applicable statute was September 1, 1990. Mr. Bradley has brought this certified conflict to the Court's attention.

SUMMARY OF THE ARGUMENT

The trial court erred in refusing to give Mr. Bradley credit for the prior 7 years served in that the statute which would allow the denial of credit for gain time only applies to crimes committed after its effective date of September 1, 1990, and only applies to the Department of Corrections.

ARGUMENT

ISSUE I

DID THE TRIAL COURT ERR IN DENYING APPELLANT CREDIT FOR TIME SERVED?

Mr. Bradley was given a 7-year sentence on December 4, 1991; but he had already received this 7 years when initially sentenced on February 20, 1990. Mr. Bradley served his 7-year sentence in 18 months, but the trial court refused to give Mr. Bradley credit for the entire 7 years by denying him credit for his gain time. The trial court refused to apply State v. Green, 547 So.2d 925 (Fla. 1989), to Mr. Bradley's case.

On appeal Mr. Bradley argued that statutory amendments designed to legislatively do away with Green did not take effect until September 1, 1990. The Second District Court of Appeal, however, applied a statutory change effective October 1, 1989, in a different statute and denied Mr. Bradley relief. Mr. Bradley's offenses were committed in December of 1989. The much broader issue that is to be addressed here is when was Green actually superseded by the legislature and who has the power to forfeit gain time when there is a violation of whatever form of release a defendant is on. It is Mr. Bradley's contention that the correct date for the legislative amendment that effectively did away with Green is September 1, 1990, and that only the Department of Corrections has the power to deny a defendant his gain time upon a violation of the various forms of release.

As pointed out in Green in § 944.28, Fla. Stat. (1987), gain time could only be forfeited if a prisoner was convicted of escape or if clemency on parole was revoked; and this forfeiture could only be done by the Department of Corrections. Forfeiture did not apply to revocation of probation, and there was no statutory authority for the trial court to initiate the forfeiture by denying credit for accrued gain time at resentencing upon a revocation of probation.

The opinion in Green was issued on July 20, 1989; and both the House and Senate created statutory amendments to fill the holes in the statutes that Green had highlighted. (This process apparently started before Green was issued as the amendments were approved by the Governor on June 28, 1989.) The end result was three amendments to two different statutes in 1989 effective on two different dates: Ch. 89-531 (Senate Bill #12-B) changed both § 944.28 and 948.06 (sections 6 and 13, respectively) and were to become effective on October 1, 1989 (section 20). The change to § 944.28 was to add probation and community control and provisional release to the Department of Corrections' powers to forfeit gain time if it so desired (note the word "may"). In the same bill there was an amendment to § 948.06 that added an entire subsection 6[1] which apparently accomplishes the same thing as the Ch. 89-531

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[1] §948.06(6), Fla. Stat. (1989), states:

> (6) Notwithstanding any provision of law to the contrary, whenever probation or community control, including the probationary or (continued...)

amendment to § 944.28(1). While the amendment to § 944.28(1) was under the chapter titled "State Correctional Systems," the amendment to § 948.06 was under the chapter titled "Probation and Community Control" (naturally, the amendment to the chapter on probation and community control does not refer to escape or parole). If it is to be presumed the legislature wished to insure that forfeiture of gain time could be done on violations of community control and probation as well as violations of parole and clemency or upon an escape, it is only logical the legislature would put this provision into both chapters. Problems occur, however, when the other arm of legislature--the House--tries to correct the same problem by enacting its own statutory amendment with slightly more encompassing language and a different effective date. The House version in Chapter 89-526 (House Bill No. 9-A)

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[1](...continued)
community control portion of a split sentence, is violated and the probation or community control is revoked, the offender, by reason of his misconduct, may be deemed to have forfeited all gain-time or commutation of time for good conduct, as provided by law, earned up to the date of this release on probation or community control from a state correctional institution. This subsection does not deprive the prisoner of his right to gain-time or commutation of time for good conduct, as provided by law, from the date on which he is returned to prison.

created its own new subsection 6 to § 948.06[2] which added control release to the list of when gain time may be forfeited.

The important things to note about these two bills are the following:

1. Both sets of amendments (Ch. 89-531 and 89-526) were approved by the Governor on the same date.

2. Both sets of amendments are designed to accomplish the same goal (i.e., allowing the forfeiture of gain time for violations of various forms of supervised release), but the Ch. 89-526 is broader in that it includes control release as well as probation and community control.

3. The more broad statute in Ch. 89-526 has an effective date of September 1, 1990, while Ch. 89-531 has an effective date of October 1, 1989.

4. Both amendments of subsection (6) to § 948.06 are completely underlined, which indicates that the House version (Ch. 89-526) did not consider itself a modification of the Senate version (Ch. 89-531).

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[2] § 948.06(6), Fla. Stat. (Supp. 1990), states:

> (6) Any provision of law to the contrary notwithstanding, whenever probation, community control, or control release, including the probationary, community control portion of a split sentence, is violated and the probation or community control is revoked, the offender, by reason of misconduct, may be deemed to have forfeited all gain-time or commutation of time for good conduct, as provided by law, earned up to the date of his release on probation, community control, or control release. This subsection does not deprive the prisoner of his right to gain-time or commutation of time for good conduct, as provided by law, from the date on which he is returned to prison.

There are several conclusions that can be reached from the above. The first is that the addition to § 948.06 in both bills was meant to accomplish the same objective. Secondly, because the House version is more broad in scope, it should take precedence over the Senate version. Thirdly, because the House version had an effective date farther away than the Senate version, it should take precedence over the Senate version. Under § 775.021(1), Fla. Stat. (1991), statutes pertaining to criminal defendants shall be strictly construed; and "when the language is susceptible of differing constructions, it shall be construed most favorably to the accused." (Emphasis added.) In this case we have the Senate and House trying to accomplish the same goal, but the left hand is not paying attention to the right hand. The Senate has an earlier effective date than the House; but applying the rule of construction requires construing conflicting criminal statutes most favorably to the accused. Thus, the House's latter effective date of September 1, 1990, would be more favorable to the accused as opposed to the effective date of October 1, 1989. This reasoning would apply to both of the Senate's amendments to this idea of broadening forfeiture of gain time in Ch. 89-531--§ 944.28(1) as well as § 948.06(6). The conclusion is that forfeiture of gain time for probation, community control and control release violations became effective on September 1, 1990.

The Second District Court of Appeal held that the two versions of the same amendment to § 948.06(6) were not really the same. The Second District Court of Appeal found the Senate version

(Ch. 89-531) gave the authority to forfeit gain time upon a revocation of probation or community control to the trial court and the House version merely added control release to the subsection. Mr. Bradley disagrees with these conclusions. There is nothing in the Senate version that states the trial court has the authority to forfeit gain time. On the contrary, neither version of § 948.06(6) says who is to decide whether or not forfeiture is in order. Although the State would like to have this Court believe that this subsection pertains to trial courts and their power to forfeit gain time, this assumption is not correct. Once the House version added control release to the list, any assumption about this section pertaining to the trial court's authority became invalid. Under § 947.146, Fla. Stat. (1989), determining violations and revoking control release is the sole authority of the Control Release Authority. The trial court never sees these defendants upon revocation of control release and would have no opportunity to consider a forfeiture of gain time in this circumstance. This duty, under Ch. 947 of the Florida Statutes, along with duties pertaining to violations of parole belong to separate authorities/commissions created for that purpose. In a broader scope this is under the auspices of the Department of Corrections, not the trial court, as was clarified in the amendment to § 944.28(1), Fla. Stat. (1989) in Ch. 89-531.[3]

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[3] (1) If a prisoner is convicted of escape, or if the clemency, conditional release as described in chapter 947, probation or community control as described in s. 948.- (continued...)

That amendment, according to section 20 of Ch. 89-513 was supposed to be effective October 1, 1989; but in the note in § 944.28(1), Fla. Stat. (1989), the effective is published as being September 1, 1990.

Case law on this issue is not very helpful. Although district courts have reached different conclusions on which amendment and which effective date is applicable to forfeiting gain time, none of the cases sets forth an analysis as to why their choice was made. Cases holding the September 1, 1990, date applicable are: Smith v. State, 18 Fla. L. Weekly D471 (Fla. 5th DCA Feb. 12, 1993) ("Green applies, notwithstanding section 948.06(6), Florida Statutes, (Chapter 89-526, Section 8, Laws of Florida, effective September 1, 1990), because the original underlying offense occurred on February 6, 1989, prior to the effective date of the statutory change on September 1, 1990"); Ferguson v. State, 594 So.2d 864, 866 n.6 (Fla. 5th DCA 1992) ("Neither party addresses the applicability of section 948.06-(6).... This section was effective September 1, 1990. Laws 1989, Chapter 89-526, Section 8, 11, 52"); Thomas v. State, 605 So.2d 1286 (Fla. 4th DCA 1992) ("...Green applies because appellant

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[3](...continued)
01, provisional release as described in s. 944.277, or parole granted to him is revoked, the department may, without notice or hearing, declare a forfeiture of all gain-time earned according to the provisions of law by such prisoner prior to such escape or his release under such clemency, conditional release, probation or community control, provisional release, or parole.

committed the original offense before September 1, 1990, the effective date of section

948.06(6)."

As to cases holding the effective date to be October 1, 1989, not only is there the problem of no discussion but there is the additional problem of internal inconsistency. Although the Second District Court of Appeal denied any conflict with its decision in Bradley and its decision in Toschlog v. State, 604 So. 2d 22 (Fla. 2d DCA 1992); there is inconsistency with the decision it reached in another more recently issued opinion. In Bell v. State, 18 Fla. L. Weekly D298 (Fla. 2d DCA Jan. 13, 1993), the Second District Court of Appeal awarded earned gain time accrued during a prior imprisonment in accordance with State v. Green, 547 So. 2d 925 (Fla. 1989), where an offense was committed on June 20, 1990. The court stated:

> Section 948.06(6), Florida Statutes (Supp. 1990), has been enacted to counter State v. Green, 547 So. 2d 925 (Fla. 1989). The Appellant's offense was, however, committed before the effective date of the statute.

Although the opinion doesn't state on its face the date of the offense, undersigned counsel's office handled that appeal. The date of Bell's offense was June 20, 1990 (see Appendix B). Even this Court has issued conflicting statements on this matter. In State v. Carter, 553 So. 2d 169 at 170 (Fla. 1989), this Court, in a footnote, stated the effective date was September 1, 1990:

> 2. We note that the legislature recently amended sections 944.28 and 948.06, Florida Statutes, to add revocation of probation to the list of circumstances justifying forfei-

> ture of gain-time. Ch. 89-526, §§ 6, 8, Laws of Fla. However, both of these amendments become effective September 1, 1990, id. section 52, and are not applicable to this case.

In another footnote in a revised opinion issued in Tripp v. State, Case Number 79,176 (Fla. June 10, 1993),[4] this Court cites to the other amendment--Ch. 89-531--and states the effective date is October 1, 1989:

> 2. We note that prior to the enactment of chapter 89-531, Laws of Florida, "credit for time served" included jail time actually served and gain time granted pursuant to section 944.275, Florida Statutes (1991). State v. Green, 547 So. 2d 925, 927 (Fla. 1989). It did not include "provisional credits" or "administrative gain time" which is used to alleviate prison overcrowding and is not related to satisfactory behavior while in prison. See § 944.277, Fla. Stat. (1991). By virtue of chapter 89-531, the revocation of probation or community control now serves to forfeit any gain time previously earned. This change in the law is inapplicable to Tripp because his crimes were committed before October 1, 1989, the effective date of the act.

Because neither Carter nor Tripp involved crimes committed after October 1, 1989, but before September 1, 1990, both footnotes can be considered dicta.

In conclusion Mr. Bradley contends that the confusion with duplicate statutes with conflicting dates of when they are to become effective require that the most favorable version be the one utilized. The statutory amendment in Ch. 89-526 with an effective date of September 1, 1990, is the appropriate statutory amendment.

> [4]As of this date Tripp is not yet final and it is anticipated that a motion for rehearing will be filed by counsel for Tripp.

However, should this Court disagree and hold the October 1, 1989, date applicable, there is still the problem of who has the authority to forfeit the gain time--the Department of Corrections or the Department of Corrections and the trial court. Mr. Bradley contends that a strict reading of the statute does not extend to the trial court the authority to forfeit gain time by refusing credit for time served. The only statutory authority for forfeiture is that pertaining to the Department of Corrections. Thus, only the Department of Corrections has the authority to forfeit gain time; and the trial court erred in this case by usurping this authority and refusing to give Mr. Bradley his 7 years of credit.

CONCLUSION

Based on the foregoing authority and argument this Court should reverse the Second District Court of Appeal's decision and order the cause be remanded for the trial court to award credit for the 7 years served.

APPENDIX

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

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

L.C. BRADLEY,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

Case No. 92-00117

Opinion filed April 14, 1993.

Appeal from the Circuit Court for Hillsborough County; Susan Sexton, Judge.

James Marion Moorman, Public Defender, Bartow, and Deborah K. Brueckheimer, Assistant Public Defender, Bartow, for Appellant.

Robert A. Butterworth, Attorney General, Tallahassee, and Charles Corces, Jr., Assistant Attorney General, Tampa, for Appellee.

PARKER, Judge.

L.C. Bradley appeals the sentences imposed upon revocation of probation because he was given credit for only the actual time he served in custody. Bradley argues that his gain time should not be forfeited because his original offenses were

committed before the effective date of the amendments to sections 944.28(1) and 948.06(6), Florida Statutes (1989). We affirm.

Bradley was charged with two counts of robbery, both occurring on December 15, 1989. Bradley pleaded guilty to both charges and was sentenced to seven years' incarceration to be followed by five years' probation on each charge, to run concurrently. In order to determine whether Bradley is entitled to accrued gain time, it is necessary to review sections 948.06(6) and 944.28(1), Florida Statutes (1989) and the amendments to these sections, as well as case law interpreting the effective dates of the amendments.

Sections 948.06(6) and 944.28(1) both address forfeiture of gain time upon revocation of probation or community control. Originally, the Department of Corrections (DOC) was given the authority to forfeit gain time pursuant to section 944.28(1), Florida Statutes (1987), if the defendant was convicted of escape or if clemency or parole was revoked. In 1988, forfeiture of gain time for a violation of conditional release was added to that statute. Effective October 1, 1989,[1] section 944.28(1) was amended to permit DOC to forfeit gain time for violations of probation or community control.[2]

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[1] See Ch. 89.531, § 20, Laws of Fla.

[2] See Ch. 89-531, § 6, Laws of Fla.

Effective October 1, 1989,[3] the authority to forfeit gain time when probation or community control was revoked was extended to the trial court. § 948.06(6), Fla. Stat. (1989).[4] Effective September 1, 1990,[5] forfeiture for a violation of control release was added.[6]

Before section 948.06, Florida Statutes (1987) was amended to provide for forfeiture, the supreme court, in State v. Green, 547 So. 2d 925 (Fla. 1989), noted that under section 944.28, Florida Statutes (1987), the trial court was without statutory authority to forfeit gain time upon a revocation of probation. In accordance with Green, this court, in Toschlog v. State, 604 So. 2d 22 (Fla. 2d DCA 1992), reversed the trial court's denial of the defendant's motion to correct sentence because the trial court failed to give the defendant credit for gain time after his community control was revoked. This court held that Green applied and that the 1991 amendment to section 944.28 did not control because the defendant's offense occurred before the enactment. Toschlog does not refer to the date of the defendant's offense, only the date of sentencing.

Also, the Fourth District, in Thomas v. State, 605 So. 2d 1286 (Fla. 4th DCA 1992), addressed the effective dates of the

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[3] See Ch. 89-531, § 20, Laws of Fla.

[4] See Ch. 89-531, § 13, Laws of Fla.

[5] See Ch. 89-526, § 52, Laws of Fla.

[6] See Ch. 89-526, § 8, Laws of Fla.

amendments to sections 948.06(6) and 944.28(1). The court correctly stated, according to the Laws of Florida, that the effective date of the amendment to section 944.28(1) is October 1, 1989. However, the court, in our opinion, incorrectly stated that the effective date of the amendment to section 948.06(6) is September 1, 1990.

Finally, the supreme court, in Carter v. State, 553 So. 2d 169, 170 (Fla. 1989), reversed the lower court's denial of gain time to a defendant upon revocation of probation on the authority of Green. The offenses in Carter occurred in 1985. The supreme court in dicta noted that the recent amendments to sections 944.28 and 948.06, Florida Statutes, to add revocation of probation to the list of circumstances justifying forfeiture of gain time did not apply because neither of the amendments were effective until September 1, 1990. Carter, 553 So. 2d at 170 n.2. The supreme court cites as its authority chapter 89-526, §§ 6, 8, Laws of Florida. However, the court makes no reference to chapter 89-531, which has the effective date as October 1, 1989, and which provides for forfeiture by the trial court of gain time in cases involving revocation of probation or community control.

In this case, the state's position is supported by the Laws of Florida which clearly set forth the effective date as of October 1, 1989, for a trial court's authority to forfeit gain time for a revocation of probation. Therefore, the trial court had the authority to forfeit Bradley's gain time. We conclude

that this court is not bound by the dicta in Carter, and we certify conflict with Thomas. Toschlog is not in conflict with this opinion because this court did not state specifically the effective date of the amendment to section 944.28.

Affirmed.

FRANK, A.C.J., and BLUE, J., Concur.

IN THE DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

JACOB F. BELL,	:	
Appellant,	:	
vs.	:	Case No. 91-3001
STATE OF FLORIDA,	:	
Appellee.	:	
	:	

APPEAL FROM THE CIRCUIT COURT
IN AND FOR HILLSBOROUGH COUNTY
STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT

JAMES MARION MOORMAN
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TENTH JUDICIAL CIRCUIT

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ATTORNEYS FOR APPELLANT

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STATEMENT OF THE CASE AND FACTS

On the State Attorney for the Thirteenth Judicial Circuit in and for Hillsborough County, Florida, filed an information in Case No. 90-2777 charging the Appellant, JACOB F. BELL, with burglary of a conveyance in violation of section 810.02(1)and (2), petit theft in violation of section 812.014(2)(d), and criminal mischief in violation of section 806.13(1)(b)1. The date of the alleged offenses was February 19, 1990. (R60-62)

On April 6, 1990, the Appellant pleaded guilty and on that date the Honorable Harry Lee Coe, III, sentenced the Appellant to two years community control on Count I, and to time served on Counts II and III. (R63-64, 67-71, 72-73) The guidelines recommended 2 1/2 to 3 1/2 years imprisonment, with a permitted range of community control to 4 1/2 years imprisonment. (R66) On that same date, Judge Coe filed a Subsequent Felony Notice. (R65)

On June 1, 1990, the Department of Corrections filed an amended affidavit of violation of community control alleging the Appellant committed the crime of aggravated assault, and that he failed to remain confined to his approved residence. (R79-80)

On July 20, 1990, in Case No. 90-10492, the state filed an information against the Appellant charging him with aggravated assault in violation of section 784.021, Florida Statutes (1989). The date of the alleged offense was June 20, 1990. (R97-98) On July 27, 1990, the Appellant pleaded guilty and was sentenced to 3 1/2 years imprisonment to be followed by 6 1/2 years probation. (R83, 100-101, 102-106, 115) The guidelines recommended 4 1/2 to

5 1/2 years with a permitted range of 3 1/2 to 7 years. (R114) Judge Coe filed a "subsequent felony notice" dated July 6, 1990, and the Appellant was sentenced as a habitual offender on only the probation. (R99, 106) At the same time, Judge Coe revoked the Appellant's community control in case no. 90-2777 and sentenced him to five years probation for burglary of a conveyance, to run concurrent with Case No. 90-10492. (R81-82, 83-84, 115)

On July 26, 1991, an affidavit of violation of probation was filed in both cases. (R132) On August 8, 1991, a hearing was held before Judge Coe and the following evidence was presented:

Tracey McClure testified that she had known the Appellant for several years, and that they dated. On May 23, 1991, just after midnight, she was on his street in a car with two other people. The Appellant was coming toward her car, so she stopped. The Appellant reached into the passenger side and hit her in the face. He said that Ms. McClure had called his mother and hung up on her. (R12-13) Ms. McClure stated that she had not seen the Appellant for four years before the incident. (R14) Someone called the police and they came to her house. An officer told her to go to the hospital. The Appellant went to the hospital with her. Ms. McClure made a police report a week after the incident. (R15) She later went to the prosecutor's office to drop the charges because the Appellant apologized. (R17) Ms. McClure had a fractured nose. (R19)

Officer Ronald Carpenter testified that he saw Ms. McClure about a week after the incident and her eyes were badly swollen and

black. (R20) He arrested the Appellant based on the interview of Ms. McClure a week later, although the officers who originally reported the incident did not. (R22)

The Appellant's probation officer, testified that the Appellant said someone who was in the car with Ms. McClure at the time she was driving up the street hit her. (R24)

Inez Michael, the Appellant's mother, testified that the Appellant was living with her. Ms. McClure was at the house even though they were not supposed to be together. (R26) After the incident, Mrs. Michael told Ms. McClure not to come to the house again, but she came back anyway. (R27)

The Appellant testified that he did not hit Ms. McClure. (R28) The Appellant had dated Ms. McClure off and on for the past seven years. They started dating when he got out of prison but she did not tell him she had other boyfriends, one of whom was Officer Carpenter's best friend. Ms. McClure was also dating a man named Rob. Ms. McClure called the Appellant from a couple of bars and wanted to go out with him, but he did not want to go out. Even though the court ordered that they were not to have any contact, Ms. McClure had spent the night with him eight times since the incident. (R28)

On the day of the incident, Ms. McClure was driving with Rob, who is a jealous person. The Appellant was waiting in the road dressed to see her. All of a sudden she hit the brakes. The Appellant went up to the car and saw Ms. McClure fighting with her boyfriend, Rob, because she was coming to pick up the Appellant.

The Appellant jumped into the car to break up the fight. Rob ran through the Appellant's neighbor's yard and the Appellant had the neighbor call the police. Ms. McClure was afraid Rob would come back, so the Appellant drove her home. (R29)

The first police officers who arrived were two female officers. Ms. McClure's roommate was there when they arrived and said, "Jake, why did you do this to her." The Appellant told the roommate not to jump to conclusions because he saved her. (R29) The Appellant was going to take her to the hospital, but he knew that he had to wait for the police. He told the officers he was on probation and they separated them to take a statement. Ms. McClure was very drunk that night. (R30)

The Appellant took Ms. McClure to the emergency room. He also took her for the out-patient surgery. Since the incident, Ms. McClure has been coming to his house wanting him to sleep with her. (R30) The Saturday before the hearing, he and Ms. McClure went out and an old girlfriend walked up and was hugging him. Ms. McClure saw it and told the Appellant that she would see him in court and F--- him up. She said she could not believe he let that girl touch him in front of her. (R31)

On that date the court revoked the Appellant's probation in Case No. 90-2777, and sentenced him to 10 years imprisonment as a habitual offender. (R37, 141, 87-90) In Case No. 90-10492, the Appellant was sentenced to 10 years imprisonment as a habitual offender to run consecutive to Case No. 90-2777, and given credit for 334 days. (R37, 112-113) The guidelines recommended 4 1/2 to

5 1/2 years imprisonment. (R114) No certified copied of prior convictions were filed or presented to the court. (R36-37)

On August 21, 1991, the Appellant moved to re-open his probation violation hearing. (R134-135) On September 6, 1991, the court heard testimony regarding the motion to re-open the violation of probation. The following testimony was presented:

Victor Williams testified that he has known the Appellant for ten or fifteen years. He was present when the incident occurred. A man named Rod and Tracy (McClure) were involved. (R42-43) Rod was the person who struck Ms McClure. He struck her while they were in a car. The Appellant chased after the car and took her to the hospital because she was badly beaten. (R43)

Kenneth Kerby testified that the Appellant and Ms. McClure had a relationship. A week after the incident he asked Ms. McClure what happened and she said a guy named Rod hit her. (R44-45)

Steven Wovockel testified that was in Ms. McClure's car when the fight occurred. Vick and another man named Rob or Roger were also in the car. They were coming down the street where the Appellant lived. (R46) The car stopped half way down the street and Ms. McClure and Rob started fighting and he hit her a couple of times. Rob got out of the car and ran up the street. The Appellant did not hit Ms. McClure; he took her to the hospital. They were on the way to pick him up. (R47)

Christopher Singleton testified that one night Ms. McClure came to the place where Mr. Singleton works to look for the

Appellant. Both of her eyes were black and he asked her who hit her and she said a man named Rod hit her. (R48)

The court would not reverse its ruling and ordered that the sentence stay intact. On September 12, 1991, the Appellant timely filed his notice of appeal. (R136-137)

SUMMARY OF THE ARGUMENT

The trial court erred in failing to give the Appellant credit for the time he served, plus gain time, against his ten-year habitual offender sentence for the same charge for which he originally received 3 1/2 years imprisonment, followed by 6 1/2 years probation.

Appellant requests that this Court certify the question of the legality of his sentence for "habitualized probation" to the Florida Supreme Court.

ARGUMENT

ISSUE I

WHETHER THE TRIAL COURT ERRED IN SENTENCING THE APPELLANT TO 10 YEARS IMPRISONMENT AS A HABITUAL OFFENDER FOR AGGRAVATED ASSAULT WITHOUT CREDIT FOR TIME SERVED PLUS GAIN TIME ACCRUED WHEN HE HAD ALREADY SERVED 3 1/2 YEARS IMPRISONMENT ON THE SAME CHARGE.

In Case No. 90-10492, the charge of aggravated assault, the Appellant was originally sentenced to 3 1/2 years imprisonment to be followed by 6 1/2 years probation. He obviously had been released from prison and had begun serving the probation. Upon violation of that probation, the Appellant was given credit for 334 days time served. (R112-113) On the record Judge Coe ordered, "Give him credit for only that time served." (R37) Appellant argues he is entitled to receive credit for time served for the actual time on the original sentence, plus any gain time served, plus any jail time he accrued waiting for the hearing on the violation of probation. The record is unclear exactly for what the Appellant is being given credit, but it is obvious he did not get credit for 3 1/2 years imprisonment.

The trial court must award a defendant credit for time served and gain time accrued during any earlier imprisonment for the offense underlying the violation of probation. State v. Green, 547 So.2d 925 (Fla. 1989); See also, State v. Perko, 588 So.2d 980, 981 (Fla. 1991). The trial court must also give the Appellant credit on each case for any time he spent in jail awaiting disposition of

the violation of probation. Daniels v. State, 491 So.2d 543 (Fla. 1986); Perko, at 982.

For these reasons, the case must be remanded to the trial court for the calculation of the proper amount of credit for time served. Parmley v. State, 590 So.2d 1016, 1017 (Fla. 2d DCA 1991).

ISSUE II

WHETHER THE TRIAL COURT ERRED IN SENTENCING THE APPELLANT TO "HABITUALIZED PROBATION."

In this case the Appellant was sentenced to "habitualized probation" in both cases. The only notice given to the Appellant was the "subsequent felony notice" filed by Judge Coe himself at the time the Appellant was originally sentenced. Upon violation of probation the trial court imposed a sentence of 10 years as a habitual offender on each case to run consecutively. Appellant argues that such a sentencing scheme is illegal and can be challenged at any time.

In Baxter v. State, 17 F.L.W. D1369 (Fla. 2d DCA May 27, 1992), Florida Supreme Court Case No. 79, 993, this court certified the conflict between King v. State, 17 F.L.W. D662 (Fla. 2d DCA March 27, 1992) and Kendrick v. State, 17 F.L.W. D812 (Fla. 5th DCA 1992), regarding the legality of a sentence of "habitual-ized probation."

The Appellant asks that this court certify the same conflict in this case.

CONCLUSION

In light of the above authorities and arguments, the Appellant respectfully requests that this Honorable Court remand his case for calculation of the appropriate amount of credit for time served. The Appellant also requests that this Court certify the conflict addressed above to the Florida Supreme Court.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Robert Butterworth, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4730, on this 30 day of July, 1992.

Respectfully submitted,

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