IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA, :

Petitioner, :

vs. : Case No. 82,799

ROBERT RUCKER, :

Respondent. :

:

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

ANSWER BRIEF OF RESPONDENT ON THE MERITS

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

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STATEMENT OF THE CASE AND FACTS

In 1977 the State Attorney's Office for the Thirteenth Judicial Circuit in and for Hillsborough County, Florida, filed three informations againts the Appellant, ROBERT RUCKER, as follows: Case No. 77-5276--burglary in violation of section 810.02, Florida Statutes (1977), occurring on July 22, 1977 (R4, 5); Case No. 77-5480--grand theft in violation of section 812.021-(2)(a), Florida Statutes (1977), occurring on July 29, 1977 (R23, 23A); and Case No. 77-6997--burglary in violation of section 810.02, Florida Statutes (1977), occurring on September 22, 1977 (R38, 39). Mr. Rucker was placed on probation on all three cases on November 26, 1979, for 5 years on each case with all terms to run concurrent (R32). Since that time Mr. Rucker's probations were violated several times (4 times prior to December 4, 1991's, hearing was the assertion at R102). The trial court always placed Mr. Rucker back on probation and never sent Mr. Rucker to prison prior to 1991 (R102, 1-3, 16-19, 29-34, 42-44, 74, 77).

On October 4, 1989, the same State Attorney's Office filed another information against Mr. Rucker charging Mr. Rucker with purchase of marijuana in violation of section 893.13(1)(a), Florida Statutes (1989), and possession of marijuana in violation of section 893.13(1)(g), occurring on August 24, 1989 (R55, 56). Mr. Rucker was placed on probation for these offensese on November 27, 1989 (R65, 66). The trial court noted it was sentencing Mr. Rucker as a habitual offender (R66, 58).

On December 4, 1991, Mr. Rucker admitted he had violated his probation (R98-101). On that date the trial court sentenced Mr. Rucker as follows:

> Case No. 77-5276 - 2 1/2 years prison followed by 3 years probation, credit for 58 days.
>
> Case No. 77-5480 - 2 1/2 years prison followed by 2 1/2 years probation, credit for 58 days.
>
> Case No. 77-6997 - 2 1/2 years prison followed by 3 years probation, credit for 58 days.
>
> Case No. 89-13813 - 10 years as a habitual offender on the purchase charge to be followed by 364 days in the county jail on the possession, credit for 51 days.

The sentences in 89-13813 were to run consecutive to that imposed in 77-6997, and all the 1977 cases were to run concurrent (R10-15, 24-28, 45-49, 67-72, 78, 79, 106, 107). A Notice of Appeal was timely filed in December 1991 (R85-86).

On October 29, 1993, the Second District Court of Appeal issued an opinion ordering resentencing in Mr. Rucker's cases. That opinion agreed with the two issues Mr. Rucker raised: the trial court was found to have erred in habitualizing Mr. Rucker and in having given Mr. Rucker probation terms beyond the statutory terms in light of the probation Mr. Rucker had already served. This latter issue was in accordance with its recent decision in Summers v. State, 18 Fla. L. Weekly D2154 (Fla. 2d DCA, October 1, 1993). There was a certified issue in Summers that was also certified in Mr. Rucker's case. The State has appealed based on that certified question.

SUMMARY OF THE ARGUMENT

The question of whether or not a defendant must be given credit for previous time served on probation when he has had his probation violated and re-imposed can be found in the clear statutory language of section 948.06(1), Florida Statutes (1987), which states that upon a violation of probation a trial court can impose any sentence it might have originally imposed prior to placing the defendant on probation. Since "sentence" is not probation, the legislature clearly meant a prison term and did not intend to include probation. Contrary to the State's position, section 948.06(1), Florida Statutes (1987), is not as broad as the State would have this Court believe; section 948.06(1), Florida Statutes (1987), does not allow the trial court to place a defendant on probation at the very beginning each time the defendant violates probation without giving credit for the prior probation time served. Case law is consistent with Respondent's position in that references to imposing any sentence that might have originally been imposed clearly refer to prison sentences--prison sentences for which no credit may be given for the previous time spent on probation.

If the statutory language is not clear or is susceptible of alternative meanings, then rules of statutory construction must be applied: Statutes pertaining to a common theme must be read together and construed to a common sense conclusion. In this case the legislature has set forth statutory maximums for criminal offenses which have been held applicable to probationary terms. A

common sense conclusion is that probation cannot be re-imposed ad infinitum beyond the statutory maximum sentence each time probation is revoked.

ARGUMENT

ISSUE I

MUST A TRIAL COURT, UPON REVOCATION OF PROBATION, CREDIT PREVIOUS TIME SERVED ON PROBATION TOWARD ANY NEWLY-IMPOSED TERM OF PROBATION SO THAT THE TOTAL PROBATIONARY TERM IS SUBJECT TO THE STATUTORY MAXIMUM FOR A SINGLE OFFENSE? (THE CERTIFIED QUESTION FROM THE SECOND DISTRICT COURT OF APPEAL)

Contrary to the State's position, Respondent contends the Second District Court of Appeal was correct to answer the above-stated question in the affirmative. Respondent would point out that the Second District Court of Appeal is not alone in this opinion. The First District Court of Appeal has also so held in Blackburn v. State, 468 So. 2d 517 (Fla. 1st DCA 1985); and more recently in Moore v. State, 623 So. 2d 795 (Fla. 1st DCA 1993). The Fourth District Court of Appeal has so held in Schertz v. State, 387 So. 2d 477 (Fla. 4th DCA 1980). Both the Second District Court of Appeal and First District Court of Appeal refer to the Fifth District Court of Appeal case of Ogden v. State, 605 So. 2d 155 (Fla. 5th DCA 1992), in their decisions allowing for credit for prior probationary terms; and on the face of Ogden, it would appear that the Fifth District Court of Appeal has also aligned itself with the Second District Court of Appeal and First District Court of Appeal:

> We held in Kolovrat that the period of probation could not be extended beyond five years, the statutory maximum. Accord Blackburn v. State, 468 So. 2d 517 (Fla. 1st DCA 1985); Watts v. State, 328 So. 2d 223 (Fla. 2d DCA

> 1976). Otherwise, probation and likewise community control could be extended by a court ad infinitum beyond the statutory maximum incarceration each time probation or community control is revoked. We doubt the legislature intended such a result.

Ogden, 605 So. 2d at 158. However, the Fifth District's earlier decision in Ramey v. State, 546 So. 2d 1156 (Fla. 5th DCA 1989), which the Fifth District tried to harmonize with Ogden and Kolovrat v. State, 574 So. 2d 294 (Fla. 5th DCA 1991), on a factual basis, is not a decision that can be harmonized with some of the Second District Court of Appeal's decisions. See Pla v. State, 602 So. 2d 692 (Fla. 2d DCA 1992) (in case 84-9595 the defendant was initially placed on 5-years probation and was sentenced to 3 1/2 years prison followed by 1 1/2 years probation upon a violation; the Second District Court of Appeal found the probation illegally extended beyond the maximum penalty). Although the Fifth District is strongly leaning in its 1992 and 1991 decisions to the Second and First District's viewpoint, the 1989 Ramey case which allowed a true split sentence of 2 1/2 years prison plus 3 1/2 years probation after the defendant had already served 13 months probation on a 5-year offense demonstrates an inconsistency in dealing with prior probationary terms served in lieu of the statutory maximum. The Third District has clearly gone the other way in Quincutti v. State, 540 So. 2d 901 (Fla. 3d DCA 1989).

In coming to its decision that once probation is violated the game starts anew, the Quincutti court cites not only to section 948.06(1), Florida Statutes (1987), but also to Poore v. State, 531 So. 2d 161 at 164 (Fla. 1988). When this Court refers to the trial

court's right to impose any sentence upon a violation of probation it could have originally imposed, it is obvious that this Court refers to "sentence" as a prison term:

> If the defendant violates his probation in alternative (3), (4) and (5), section 948.06-(1) and Pearce permit the sentencing judge to impose any sentence he or she originally might have imposed, with credit for time served and subject to the guidelines recommendation.

Poore, 531 So. 2d at 164. (Emphasis added.)

> 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 revocation of probation.

Id. at 165. (Emphasis added.) The same can be said for this Court's reference to "sentence" in State v. Holmes, 360 So. 2d 380 at 383 (Fla. 1978). In allowing a trial court to impose any "sentence" which might have been originally imposed upon a violation of probation minus jail time previously served but without credit for probation time, obviously this Court was thinking of a "sentence" as a period of incarceration. See also Franklin v. State, 545 So. 2d 851 (Fla. 1989). Since case law has clearly defined "sentence" as a period of incarceration as opposed to probation and probation has been held not to be a sentence (a concept the State agrees with at page 8 of its brief) in Villery v. Florida Parole and Probation Com'n., 396 So. 2d 1107 (Fla. 1981),

a clear reading of § 948.06(1), Fla. Stat. (1987), which allows for the imposition of any sentence a trial court might have originally imposed upon a violation of probation is a reference to a prison sentence - not a reimposition of probation. As Villery points out, this is consistent with the Florida Rules of Criminal Procedure and Florida Statutes which prohibit the pronouncement and imposition of a sentence upon a defendant placed on probation. Probation is a sentencing alternative, but it is not a sentence. Thus, when the statute is referring to any sentence that might have been originally imposed, it is clearly not referring to probation. The State's interpretation of reimposing a probationary term to the statutory maximum without credit for any prior time spent on probation as a "sentence" that could have been originally imposed is in direct contradiction to its claim that probation is not a sentence. If a trial court is going to reject "sentencing" a defendant who has violated probation and is going to continue to allow a defendant a 'state of grace' by re-imposing probation, it has to do so with the statutory maximums in mind and give the defendant credit for prior time served on probation; for statutory maximums do apply to probationary periods. Conrey v. State, 624 So. 2d 793 (Fla. 5th DCA 1993); Blackburn; Watts v. State, 328 So. 2d 223 (Fla. 2d DCA 1976). See also State v. Holmes, 360 So. 2d 380 (Fla. 1978).

If this Court believes the statute of § 948.06(1), Fla. Stat. (1987), is not clear on its face, then this Court must resort to rules of statutory construction in interpreting what this statute means. The first rule applicable is that the legislative intent is

the pole star; "this intent must be given effect even though it may appear to contradict the strict letter of the statute and well-settled cannons of construction." State v. Sullivan, 95 Fla. 191 at 207, 116 So. 255 at 261 (1928). As further explained in Wakulla County v. Davis, 395 So. 2d 540 at 542 (Fla. 1981):

> In determining our pole star, legislative intent, we are not to analyze the statute in question by itself, as if in a vacuum; we must also account for other variables. Thus, it is an accepted maxim of statutory construction that a law should be construed together and in harmony with any other statute relating to the same purpose, even though the statutes were not enacted at the same time. Garner v. Ward, 251 So. 2d 252 (Fla. 1971).

This concept of regarding closely allied statutory subjects in pari materia was more recently reiterated in Scates v. State, 603 So. 2d 504 at 506 (Fla. 1992).

The next rule in interpreting ambiguous statutes is the law favors a rational, sensible construction; and courts are to avoid an interpretation which would produce unreasonable consequences. Wakulla County v. Davis, 395 So. 2d 540 at 543 (Fla. 1981); State v. Webb, 398 So. 2d 820 at 824 (Fla. 1981); Catron v. Roger Bohn, D.C., P.A., 580 So. 2d 814 at 818 (Fla. 2d DCA 1991).

Last but not least, "where criminal statutes are susceptible to differing constructions, they must be construed in favor of the accused." Scates, 603 So. 2d at 505.

Putting all of these rules together in this situation, the following can be concluded: Inasmuch as the legislature has set forth statutory maximums for criminal cases which have been held applicable to probationary terms, a common sense conclusion is that

probation cannot be re-imposed ad infinitum beyond the statutory maximum each time probation is revoked. To allow a trial court to extend probation ad infinitum would be an unreasonable, unsensible result. It would also be an interpretation least favorable to the accused. A defendant should be allowed all credit for previous time served on probation for as long as probation is re-instated. If credit is not allowed, then the legislature's intent of statutory maximums is being circumvented. See Tripp v. State, 622 So. 2d 941 (Fla. 1993) (guidelines could be easily circumvented if trial court could impose guidelines on one count and probation on another and then not give credit for time served on the probation count when probation is later violated).

The Hon. Judge Schoonover, in the dissenting portion of the Summers decision, clearly believes that reimposing probation ad infinitum beyond the statutory maximum is not an absurd result and points to three other states that have allowed the concept. The first thing that must be noted about other jurisdictions on this issue is that the issue is purely a matter of statutory construction based on the wording of each jurisdiction's statute. For example, the California case mentioned by Judge Schoonover of In re Hamm, 133 Cal. App. 3d 60, 183 Cal. Rptr. 626 (Cal. Ct. App. 1982), dealt with specific statutory language that clearly allowed the re-imposition of "probation" as if starting from the very beginning after a violation:

> "If an order setting aside the judgment, the revocation of probation, or both is made after the expiration of the probationary period, the court may again place the person on probation

> for such period and with such terms and conditions as it could have done immediately following conviction."

In re Hamm, 183 Ca. Rptr. at 627, citing Penal Code § 1203.2(e) (emphasis added.) The Court, however, did not just look at the statutory language in a vacuum; it examined other statutes in the area. In particular, the Court looked at how a different interpretation would affect misdemeanants as opposed to felons. A different interpretation other than allowing the re-imposing of probation beyond the statutory maximum would, under California law, result in felons being treated differently than misdemeanants to the misdemeanants' detriment. Such statutory problems are not present in Florida.

And if some jurisdictions do allow probation to be imposed ad infinitum under their particular statutory scheme, other jurisdictions do not. The federal system, which has a 5-year cap on probation, has apparently been strictly interpreting that cap. See United States v. Undaneta, 771 F. Supp. 28 (E.D. N.Y. 1991), and cases cited therein.

Other concerns were raised by Judge Schoonover and echoed by the State. Restitution was a major concern. Apparently, both the State and Judge Schoonover would like probationary terms extended ad infinitum in order to allow restitution to be paid back. The gist of this argument is that the defendant may be a good probationer but unable to make full restitution within the statutory limits. This Court has already given us the answer. If a defendant cannot make full restitution due to an inability to pay,

then his probation cannot be revoked and extended in the absence of a wilful violation. Hewett v. State, 613 So. 2d 1305 (Fla. 1993). See also Kolovrat v. State, 574 So. 2d 294 at 296 (Fla. 5th DCA 1991); Laing v. State, 622 So. 2d 560 (Fla. 3d DCA 1993). If, on the other hand, a defendant is 'wilfully' not making restitution payments, then he knows he faces revocation and imprisonment. That is the recourse society has against a defendant who has received the benefit of the court's mercy by being placed on probation but subsequently violates that trust. Either the probationer is making an effort to rehabilitate himself or he is not. The concept of the poor unfortunate probationer who must go to prison through no fault of his own does not exist. For society's victims who are not able to receive full restitution during the limited period of statutory maximum sentences from probationers who lack the ability to pay, there are alternatives. As this Court pointed out in Hewett, a judgment can be entered against the defendant with the hope that someday the defendant's circumstances will change.

The concern that a defendant needs to be continuously reinstated on probation and that probation must have no limits so as to obtain a goal of rehabilitation while not rewarding the errant probationer is rather an inconsistent argument for the State to make. If a probationer is continuously violating his probation, rehabilitation is not occurring. More probation ad infinitum would appear to be defeating the goal of probation which is rehabilitation. The fact that both the defendant and the Court knows the ultimate consequence of failing to successfully live on probation

is prison, this knowledge gives the incentive needed for the probationer to avoid violating his probation and a recourse for society if rehabilitation fails. After a certain point, continuing on with probation makes no sense. That point is the statutory maximum.

As for the State's desire to keep as many people out of the prison system as possible due to a lack of space, that is a problem that affects the State as a whole and will continue to do so because of many factors such as money, habitual offender sentences, and minimum mandatories. That problem cannot, however, be used as the polestar to determine statutory language as to the maximum length of probation terms. Probation is a creature of legislation, not of public policy. Legislatively, statutory maximums apply to probation, and extending probationary terms beyond that statutory maximum ad infinitum is not within legislative intent.

Finally, the anomaly addressed by the majority in Summers in footnote 6, wherein a defendant who does not violate his probation until near the end of his probationary period and is then subject to the statutory maximum prison sentence could result in almost double the statutory maximum having been served on probation and in prison, is a problem that does exist. At least a defendant on probation understands that prison is the alternative should he fall from grace, and there is a limit to the probationary term. What defendant's do not understand is how they can be placed on 10-15-20 years up to life on probation for a third-degree felony. Such a concept makes no sense. The decision in Summers should be upheld.

CONCLUSION

In light of the foregoing reasons, arguments, and authorities, Respondent asks this Honorable Court to uphold the opinion of the Second District Court of Appeal.

APPENDIX

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ing barbell weights. They then left the area. Gaffney again called the police. At about 4:10 a.m., Police Officers Mormon and Tindle arrived. They entered the building through an opened door on the side of the building and observed that someone had entered the building through an air vent in the attic.

The appellant was subsequently arrested. At the trial, one of the officers testified that Gaffney, who reported the burglary, told him that the appellant was involved. However, this was stricken as hearsay.

On direct examination, Gaffney was asked at two different times whether he saw either of the two perpetrators in the courtroom. He replied the first time, "No. Because I was told it was a guy here," and the second time, "No, I can't answer that." He also denied telling the police officers that he recognized the appellant as one of the perpetrators. Although Gaffney admitted knowing the appellant from the neighborhood, in response to the question whether he told police he recognized the appellant as a perpetrator, Gaffney replied, "I didn't recognize him but that was what I was told."

During the testimony of an employee of the recreational center, an implication arose that Gaffney's testimony was influenced by threats from either the appellant or the codefendant. This implication was further bolstered by Gaffney's equivocal responses to questions concerning the appellant's involvement. The trial court thus concluded that Gaffney was not telling the truth.

Although inferences from the testimony may support a finding that Gaffney was not telling the truth, they do not necessarily support the further conclusion that the appellant committed the burglary and theft. To conclude from Gaffney's failure to identify the appellant that the appellant committed these offenses requires an impermissible pyramiding of inferences. *See Benson v. State*, 526 So. 2d 948 (Fla. 2d DCA), *rev. denied*, 536 So. 2d 243 (Fla. 1988), *cert. denied*, *Benson v. Florida*, 489 U.S. 1069, 109 S. Ct. 1349, 103 L. Ed. 2d 817 (1989). Where two or more inferences in regard to the existence of a criminal act must be drawn from the evidence and then pyramided to prove the crime charged, the evidence lacks the conclusive nature to support a conviction. *Collins v. State*, 438 So. 2d 1036 (Fla. 2d DCA 1983). The state must prove the identity of the accused as the perpetrator beyond a reasonable doubt. *Davis v. State*, 438 So. 2d 973 (Fla. 2d DCA 1983). The state failed to do this in this case. We therefore reverse the appellant's convictions.

Reversed. (CAMPBELL, A.C.J., and SCHOONOVER, J., Concur.)

* * *

Criminal law—Sentencing—Habitual violent felony offender—Predicate convictions—Error to sentence defendant as habitual violent felony offender based on conviction for robbery where out-of-state conviction cannot be used to habitualize offense committed before May 2, 1991—Error to sentence defendant for 1989 conviction as habitual nonviolent offender where his 1977 crimes carried five-year statutory maximums, his time served on probation for those offenses exceeded five years, and defendant was improperly continued on probation at time of 1989 conviction—Credit for time served—Remanded for evidentiary hearing to determine amount of credit due for time served on probation for 1977 offenses—Sentencing scheme for probation violation impermissibly sandwiched terms of probation on 1977 crimes between prison sentences for 1977 crimes and habitualized prison sentence for 1989 crime—Question certified whether trial court must, upon revocation of probation, credit previous time served on probation toward any newly imposed term of probation so that total probationary term is subject to statutory maximum for single offense

ROBERT RUCKER, Appellant, v. STATE OF FLORIDA, Appellee. 2nd District. Case No. 92-00116. Opinion filed October 29, 1993. Appeal from the Circuit Court for Hillsborough County; Harry Lee Coe, III, Judge. James Marion Moorman, Public Defender, and Deborah K. Brueckheimer, Assistant Public Defender, Bartow, for Appellant. Robert A. Butterworth, Attorney General, Tallahassee, and David R. Gemmer, Assistant Attorney General, Tampa, for Appellee.

(PATTERSON, Judge.) Defendant appeals the sentences that the trial court imposed upon revocation of his probation for various offenses. We reverse and remand for resentencing.

Defendant first challenges the habitualized sentence he received upon his conviction for purchase of cannabis, a third-degree felony, after revocation of probation for that offense. He argues that the requisite prior record for habitualization is lacking. We agree under the facts of this case.

Defendant was originally placed on habitualized probation for the purchase of cannabis offense, which he committed on August 24, 1989. The trial court at that time also continued him on probation for three other third-degree felonies (two burglaries and a grand theft) he had committed years earlier, in 1977. His prior record additionally includes a 1980 robbery in Georgia, for which he admitted serving nine years in prison.

Though defendant violated his probation for his 1977 offenses on several occasions in the past, he was always placed back on probation. However, after violating his probation in 1990 for both the 1977 and 1989 offenses, the trial court imposed prison sentences for the first time, including a habitualized sentence for his purchase of cannabis conviction. It is these sentences that defendant appeals.

At the onset we note that nothing in the record indicates whether defendant's habitualized sentence is for nonviolent or violent habitualization. While the lack of any mention of a mandatory minimum sentence strongly suggests nonviolent habitualization, we will address the propriety of both types of habitualization since both are at issue in this case.

We conclude that defendant does not qualify for treatment as a habitual violent felony offender as a result of his 1980 Georgia robbery conviction. The purchase of cannabis offense was committed on August 24, 1989 and out-of-state convictions cannot be used to habitualize an offense committed before May 2, 1991 under section 775.084(1)(c). *State v. Johnson*, 616 So. 2d 1 (Fla. 1993) (window period for attacking chapter 89-280, Laws of Florida, as violative of single-subject rule runs from the effective date October 1, 1989 to May 2, 1991, the date of reenactment).

We also conclude that defendant does not qualify for treatment as a habitual nonviolent felony offender. As we will explain, defendant's 1977 crimes cannot properly be relied upon as prior felonies.

Nonviolent habitualization requires two or more prior felonies. § 775.084(1)(a)1., Fla. Stat. (1989). This requirement is satisfied in this case. However, it is also required that

> [t]he felony for which the defendant is to be sentenced was committed within 5 years of the date of the conviction of the last prior felony or other qualified offense of which he was convicted, or within 5 years of the defendant's release, on parole or otherwise, from a prison sentence or other commitment imposed as a result of a prior conviction for a felony or other qualified offense, whichever is later[.]

§ 775.084(1)(a)2.

Defendant argues that his 1977 crimes cannot serve as a proper basis for habitualizing his 1989 conviction for purchase of cannabis. He notes that they were committed more than five years before the 1989 conviction and that until the 1991 sentencing, he never served any prison time for them but was merely kept on probation after the occasions on which he violated it. He specifically contends that his habitualization was improper because under section 775.084(1)(a)2, the five-year limit has been exceeded, pointing out that he might have been illegally continued on probation in 1989 for the 1977 offenses.

We conclude that defendant is correct. Third-degree felonies have five-year statutory maximums, and he is entitled to credit for time already served on probation for these offenses. *See Summers v. State*, No. 91-03686 (Fla. 2d DCA Oct. 1, 1993) (en banc). While it is true that he did not at the time challenge what

appears to have been an illegal imposition of probation in 1989 for his 1977 offenses, he is less challenging that imposition in itself than as an underlying basis for habitualization of an altogether different offense, his 1989 purchase of cannabis.

We also conclude that *King v. State*, 373 So. 2d 78 (Fla. 3d DCA), *cert. denied*, 383 So. 2d 1197 (Fla. 1979) (defendant not entitled to accept benefit of probation imposed for an offense and later challenge propriety of that probation upon its revocation) does not call for a different result. The rationale of *King* is that when a defendant accepts the benefit of an illegal placement on probation when the proper sentence called for mandatory prison time, he is precluded from later challenging on estoppel grounds the legality of that probation upon its revocation. However, in the instant case defendant cannot be said to have benefited from the illegality of his placement on probation in 1989 for his 1977 offenses, as it appears that that placement violated the statutory maximum. *Summers*.

Defendant suggests that because it is impossible to determine from the record just how much time he has actually served on probation for the 1977 offenses, an evidentiary hearing should be held to determine the amount of credit to which he is entitled. We agree and direct the court on remand at resentencing to make that determination.

Defendant next challenges the overall structure of his sentence, arguing that the trial court imposed an illegal interrupted sentencing scheme. At the sentencing hearing, the trial court sentenced him as follows:

> The three 77s, I sentence him to two-and-a-half concurrent followed by two-and-a-half probation on the grand theft. Three years' probation on the burglaries.[1]
>
> On 89-13813, I sentence him to ten years *consecutive* as a habitual offender. 364 consecutive on the misdemeanor. He will do the first three regular time; the 89 as a habitual.
>
> . . . .
>
> The probation runs consecutive to the jail time but concurrent.

(Emphasis added.) The written dispositions are consistent with the court's oral pronouncements. We conclude that the court's sentencing scheme impermissibly sandwiches terms of probation on the 1977 crimes between prison sentences for the 1977 crimes and the habitualized prison sentence for the 1989 crime. *See Sanchez v. State*, 538 So. 2d 923 (Fla. 5th DCA 1989); *Massey v. State*, 389 So. 2d 712 (Fla. 2d DCA 1980). Accordingly, we direct the trial court on remand to consider an alternative disposition.

As in *Summers*, we certify to the supreme court the following as a question of great public importance:

> MUST A TRIAL COURT, UPON REVOCATION OF PROBATION, CREDIT PREVIOUS TIME SERVED ON PROBATION TOWARD ANY NEWLY-IMPOSED TERM OF PROBATION SO THAT THE TOTAL PROBATIONARY TERM IS SUBJECT TO THE STATUTORY MAXIMUM FOR A SINGLE OFFENSE?

Reversed and remanded for resentencing. (DANAHY, A.C.J., and BLUE, J., Concur.)

[1]Defendant also argues that his probationary split sentences for his three 1977 offenses exceed the statutory maximum. He notes that the sentences for two of them, 77-5276 and 77-6997, are illegal on their face as they impose a total of 5½ years and the applicable statutory maximum is only five years. Reversal is required for this reason alone.

* * *

Criminal law—Sentencing—Community control—No error to reimpose community control upon violation of community control—Sentence to be corrected to reflect credit for time served on community control prior to violation—No error to reimpose jail time as condition of community control—Sentence to be corrected to reflect credit for jail time previously served

MILTON EARL JENKINS, Appellant, v. STATE OF FLORIDA, Appellee. 2nd District. Case No. 92-02849. Opinion filed October 29, 1993. Appeal from the Circuit Court for Hillsborough County; Barbara Fleischer, Judge. James Marion Moorman, Public Defender, and Andrea Norgard, Assistant Public Defender, Bartow, for Appellant. Robert A. Butterworth, Attorney General, Tallahassee, and Ron Napolitano, Assistant Attorney General, Tampa, for Appellee.

(FRANK, Chief Judge.) Milton Jenkins has appealed from the sentence imposed upon him following violation of community control. We find no error in the court's reimposition of community control. We remand this matter, however, so that the sentence can be corrected to reflect credit for that portion of community control Jenkins had successfully completed prior to violation. Furthermore, it was lawful for the judge to reimpose jail time as a condition of community control, but on remand the sentence should be corrected to reflect credit for previous jail time actually served. §948.06(6), Fla. Stat. (1991).

Affirmed in part, and remanded. (DANAHY and PATTERSON, JJ., Concur.)

* * *

Criminal law—Sentencing—Split sentence—Error to sentence defendant who committed third-degree felony to five-year term of probation with "special condition" of five-year prison term, and upon release from prison, two years of community control and "balance of term" on probation—Probationary split sentence cannot exceed statutory maximum sentence—Five-year prison term as special condition of probation illegal—"Balance of term" on probation was invalid as insufficiently definite and certain—Guidelines—Departure—Abuse of position of familial authority is not valid reason for departure in child molestation case because any act of child molestation involves abuse of authority and breach of trust—Judges—No error to deny defendant's motion to recuse where motion was legally insufficient and judge did not create "adversary atmosphere" with defendant—Prosecutor's inappropriate comments regarding motion for recusal should not be attributed to trial judge

WILLIAM B. RANDOLPH, Appellant, v. STATE OF FLORIDA, Appellee. 2nd District. Case No. 93-00092. Opinion filed October 29, 1993. Appeal from the Circuit Court for Pinellas County; W. Douglas Baird, Judge. James Marion Moorman, Public Defender, Bartow, and Brad Permar, Assistant Public Defender, Clearwater, for Appellant. Robert A. Butterworth, Attorney General, Tallahassee, and Carol M. Dittmar, Assistant Attorney General, Tampa, for Appellee.

(PATTERSON, Judge.) William Randolph appeals from his judgment and sentence for attempted handling and fondling of a child under sixteen. He argues that the trial judge erred in sentencing him and in denying his motion to recuse. We reverse Randolph's sentence, affirm the denial of the motion to recuse, and remand for resentencing.

In sentencing Randolph for a third-degree felony, the trial judge imposed a sentence of a five-year term of probation, with a "special condition" that Randolph serve five years in prison and that, upon release from prison, Randolph would be placed on community control for two years, with "the balance of the term" to be served on probation. No objection was necessary to preserve the issue for review, because this is an illegal sentence which constitutes fundamental error. *See Greenhalgh v. State*, 582 So. 2d 107 (Fla. 2d DCA 1991). A probationary split sentence cannot exceed the statutory maximum sentence. *See Blizzard v. State*, 600 So. 2d 542 (Fla. 1st DCA 1992); *Gerow v. State*, 516 So. 2d 326 (Fla. 2d DCA 1987). Thus, it was error to impose community control and probation in addition to the five-year prison term.

Also, the special condition of probation that Randolph serve five years in prison was illegal. *See Rosa v. State*, 592 So. 2d 769 (Fla. 5th DCA 1992); § 948.03(5), Fla. Stat. (1991). Furthermore, ordering that the "balance of the term" be served on probation was illegal because the term of probation was not definite and certain. *See Maynard v. State*, 561 So. 2d 449 (Fla. 5th DCA 1990).

In departing from the guidelines, the trial judge gave as his

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to David R. Gemmer, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4730, on this 4th day of February, 1994.

Respectfully submitted,

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