3-15

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA, :

Petitioner, :

vs. : Case No. 82,829

SANDY SIMMS, :

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

CYNTHIA J. DODGE
ASSISTANT PUBLIC DEFENDER
FLORIDA BAR NUMBER 345172

Public Defender's Office
Polk County Courthouse
P. O. Box 9000--Drawer PD
Bartow, FL 33830
(813) 534-4200

ATTORNEYS FOR RESPONDENT

TOPICAL INDEX TO BRIEF

	PAGE NO.
STATEMENT OF THE CASE AND FACTS	1
SUMMARY OF THE ARGUMENT	3
ARGUMENT	5
ISSUE	
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)	5
CONCLUSION	15
APPENDIX	
CERTIFICATE OF SERVICE	

TABLE OF CITATIONS

CASES	PAGE NO.
Blackburn v. State, 468 So. 2d 517 (Fla. 1st DCA 1985)	5, 8
Catron v. Roger Bohn, D.C., P.A., 580 So. 2d 814 at 818 (Fla. 2d DCA 1991)	9
Conrey v. State, 624 So. 2d 793 (Fla. 5th DCA 1993)	8
Franklin v. State, 545 So. 2d 851 (Fla. 1989)	7
Garner v. Ward, 251 So. 2d 252 (Fla. 1971)	9
Hewett v. State, 613 So. 2d 1305 (Fla. 1993)	12
Kolovrat v. State, 574 So. 2d 294 (Fla. 5th DCA 1991)	6, 12
Laing v. State, 622 So. 2d 560 (Fla. 3d DCA 1993)	12
Moore v. State, 623 So. 2d 795 (Fla. 1st DCA 1993)	5
Ogden v. State, 605 So. 2d 155 (Fla. 5th DCA 1992)	5, 6
Pla v. State, 602 So. 2d 692 (Fla. 2d DCA 1992)	6
Poore v. State, 531 So. 2d 161 at 164 (Fla. 1988)	7
Quincutti v. State, 540 So. 2d 901 (Fla. 3d DCA 1989)	6
Ramey v. State, 546 So. 2d 1156 (Fla. 5th DCA 1989)	6
Scates v. State, 603 So. 2d 504 at 506 (Fla. 1992)	9
Schertz v. State, 387 So. 2d 477 (Fla. 4th DCA 1980)	5

TABLE OF CITATIONS (continued)

Simms v. State,
18 Fla. L. Weekly D2510 (Fla. 2d DCA November 24, 1993) 2

State v. Christopher Gene Summers,
Fla. Sup. Ct. Case No. 82 1

State v. Holmes,
360 So. 2d 380 at 383 (Fla. 1978) 7, 8

State v. Sullivan,
95 Fla. 191 at 207, 116 So. 255 at 261 (1928) 9

State v. Webb,
398 So. 2d 820 at 824 (Fla. 1981) 9

Tripp v. State,
622 So. 2d 941 (Fla. 1993) 10

United States v. Undaneta,
771 F. Supp. 28 (E.D. N.Y. 1991) 11

Villery v. Florida Parole and Probation Com'n.,
396 So. 2d 1107 (Fla. 1981) 8

Wakulla County v. Davis,
395 So. 2d 540 at 542 (Fla. 1981) 9

Watts v. State,
328 So. 2d 223 (Fla. 2d DCA 1976) 6, 8

OTHER AUTHORITIES

§ 893.13 (1)(f), Fla. Stat. (1989) 1
§ 893.13(1)(a), Fla. Stat. (1989) 1
§ 948.06(1), Fla. Stat. (1987) 3, 7-9

STATEMENT OF THE CASE AND FACTS

The Petitioner, the State of Florida, in adopting the brief in State v. Christopher Gene Summers, Fla. Sup. Ct. Case No. 82, 632, did not file a statement of the case and facts in the instant case. The facts are as follows:

On July 9, 1990, the State Attorney for the Thirteenth Judicial Circuit in and for Hillsborough County, Florida, filed an information charging the respondent, SANDY SIMMS, with delivery of cocaine in violation of § 893.13(1)(a), Fla. Stat. (1989); and possession of cocaine in violation of § 893.13 (1)(f), Fla. Stat. (1989). The alleged offense occurred on June 28, 1990. On July 19, 1990, the respondent pleaded guilty as charged and the Honorable Harry Lee Coe, III, Circuit Judge, sentenced her to two years community control on each count to run concurrently with each other and concurrently with Circuit Case No. 90-7887. The guidelines recommended community control to 12 to 30 months imprisonment.

On August 16, 1990, Judge Coe revoked the respondent's community control and sentenced her to three years probation on each count to run concurrently, but consecutive to 3 1/2 years imprisonment in Case No. 90-7887.

On January 28, 1991, the Department of Corrections filed an affidavit of violation of probation alleging technical violations. The respondent admitted the violation. On April 26, 1991, Judge

Coe revoked respondent's probation and sentenced her to three years and six months imprisonment, followed by eleven years and six months probation on Count I and five years probation on Count II, to run concurrently with probation on Count I, with 51 days credit for time served. The guidelines range was probation to 3 1/2 years imprisonment. The respondent timely filed her notice of appeal on May 7, 1991.

On November 24, 1993, the Second District Court of Appeal remanded the case for the trial court to award credit for the time Ms. Simms served previously on probation. Simms v. State, 18 Fla. L. Weekly D2510 (Fla. 2d DCA November 24, 1993). As in Summers, the Second District also certified the question of whether the trial court must, upon revocation of probation, credit previous time served on probation, so that the total probationary term is subject to the statutory maximum for the offense.

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 in such a way as to provide "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

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 to the Second and First District's viewpoint in its 1992 and 1991 decisions, 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. This is because 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 Honorable 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 Hamm 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 some day 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 know 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 to 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, the Respondent respectfully requests that this Honorable Court to affirm the opinion of the Second District Court of Appeal.

APPENDIX

PAGE NO.

Sandy Simms v. State of Florida,
Case No. 91-01549, 18 Fla. L. Weekly D2510 (Fla. 2d DCA November 24, 1993).

ATE JUDGE, Concur.)

* * *

Criminal law—Dealing in stolen property—Defendant/pawnbroker who purchased rifle from two confidential informants, who represented that rifle was stolen and who were acting under direction of law enforcement personnel in course of expansive sting operation, was entrapped as a matter of law where law enforcement agency had no independent information that defendant or his business ever knowingly purchased stolen property, there was no record evidence to indicate that defendant was predisposed to commit charged offense, and no one had tipped sheriff's office that defendant would knowingly negotiate for stolen merchandise

STATE OF FLORIDA, Appellant, v. WILLIAM ROYCE HOWELL, Appellee. 2nd District. Case No. 92-03914. Opinion filed November 24, 1993. Appeal from the Circuit Court for Pasco County; Stanley R. Mills, Judge. Robert A. Butterworth, Attorney General, Tallahassee, and Ann P. Corcoran, Assistant Attorney General, Tampa, for Appellant. Samuel J. Williams of Williams & Williams, New Port Richey, for Appellee.

(FRANK, Chief Judge.) William Royce Howell, owner of a pawnshop in Pasco County, was arrested and charged with dealing in stolen property after he purchased a rifle from two confidential informants who represented the weapon as having been stolen. The Pasco County Sheriff's Office had begun investigating all pawnshops on the west side of the county after victims of thefts reported finding their property in certain pawnshops, including Howell's. Howell moved to dismiss the information, alleging entrapment. The trial court, applying the doctrine of objective entrapment set forth in *Cruz v. State*, 465 So. 2d 516 (Fla.), *cert. denied*, 473 U.S. 905, 105 S.Ct. 3527, 87 L.Ed.2d 652 (1985), determined as a matter of law that Howell had been entrapped and dismissed the information. The trial court achieved the correct result, even though *Cruz*, as we show below, no longer controls. We have considered all errors urged by the state; we affirm the trial court.

Our supreme court outlined the defense of objective entrapment in *Cruz*, explaining that that defense focused on the police activity leading up to an arrest, not on the predisposition of the accused toward criminality. 465 So. 2d at 520. The Florida Supreme Court has recently rejected *Cruz*, announcing that our legislature, in enacting section 777.201, Florida Statutes (1987), abolished the objective test in favor of a subjective evaluation centering on the accused's propensity to engage in the charged offense. *Munoz v. State*, 18 Fla. L. Weekly S537 (Fla. Oct. 14, 1993). Section 777.201(1), Florida Statutes (1987), provides:

> A law enforcement officer, a person engaged in cooperation with a law enforcement officer, or a person acting as an agent of a law enforcement officer perpetrates an entrapment if, for the purpose of obtaining evidence of the commission of a crime, he induces or encourages and, as a direct result, causes another person to engage in conduct constituting such crime by employing methods of persuasion or inducement which create a substantial risk that such crime will be committed by a person other than one who is ready to commit it.

The subjective view requires the accused to establish by a preponderance of the evidence that the government induced the offense. Once that burden is met, the accused must then show the absence of a predisposition to commit the particular crime. *Munoz*, 18 Fla. L. Weekly at S541. Once that showing occurs, the burden shifts to the state to rebut the evidence of no proclivity to commit the crime and to establish that the accused was disposed to undertake the offense "prior to and independent of the government's inducement." *Munoz*, 18 Fla. L. Weekly at S539 (*citing Jacobson v. United States*, ___ U.S. ___, 112 S.Ct. 1535, 118 L.Ed.2d 174 (1992)). Moreover, normally the issue of entrapment is reserved for the jury. *See* §777.201(2), Fla. Stat. (1987). In certain instances, however, the question whether an accused was subjectively entrapped rests with the trial court for resolution as a matter of law:

> If the factual circumstances of a case are not in dispute, if the accused establishes that the government induced the accused to commit the offense charged, and if the State is unable to demonstrate sufficient evidence of predisposition prior to and independent of the government conduct at issue, then the trial judge has the authority to rule on the issue of predisposition as a matter of law because no factual "question of predisposition" is at issue.

Munoz, 18 Fla. L. Weekly at S541 (citations omitted).

In the present matter, the undisputed facts reveal that two confidential informants, under the direction of law enforcement personnel, induced Howell to purchase the rifle. In spite of that which may have been taking place in other pawn shops in Pasco County, law enforcement had no independent information prior to the expansive sting operation that Howell or his business ever knowingly purchased stolen property. There is no evidence in this record to indicate that Howell was predisposed to commit the charged offense, and no one had tipped the sheriff's office that Howell would knowingly negotiate for stolen merchandise. These circumstances are strikingly similar to those the supreme court evaluated in *Munoz*. The state charged Munoz with two counts of the sale or distribution of harmful materials to a minor after a juvenile informant was able to obtain pornographic material from Munoz's video store. Munoz and his store—the "Video Den"—were targets of a sweeping investigation into all video stores in Bay County that distributed X-rated movies. That investigation stemmed from an anonymous tip regarding some other video store in Bay County which had allegedly rented X-rated films to minors. Law enforcement had no independent knowledge that Munoz was renting pornographic films to minors, nor had it received complaints involving the Video Den. The supreme court determined that pursuant to the subjective test established in section 777.201, the accused was entrapped as a matter of law; the court therefore reinstated the trial court's order dismissing the information. Assessing the matter before us in the light of *Munoz* and section 777.201, we are compelled to the conclusion that Howell, too, was entrapped as a matter of law.

Accordingly, we affirm. (CAMPBELL, J., and HAWORTH, LEE E., Associate Judge, Concur.)

* * *

Criminal law—Sentencing—Probation revocation—When imposing sentence upon revocation of probation which was imposed consecutive to period of incarceration on separate charge, defendant was entitled to credit for time served on incarcerative sentence, including earned gain time—Where probationary term is revoked and new probationary term is imposed, defendant is entitled to credit on new sentence of probation for any time previously served on probation—Defendant not entitled to credit against probation sentence for time spent on community control—Question certified whether a trial court must, 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

SANDY SIMMS, Appellant, v. STATE OF FLORIDA, Appellee. 2nd District. Case No. 91-01549. Opinion filed November 24, 1993. Appeal from the Circuit Court for Hillsborough County; Harry Lee Coe, III, Judge. James Marion Moorman, Public Defender, and Cynthia J. Dodge, Assistant Public Defender, Bartow, for Appellant. Robert A. Butterworth, Attorney General, Tallahassee, and Erica M. Raffel, Assistant Attorney General, Tampa, for Appellee.

(PER CURIAM.) Defendant challenges the sentence imposed upon revocation of probation.

Defendant was sentenced upon violation of community control to three years probation consecutive to a sentence of three and a half years state prison on a separate charge that was before the trial court at the same time. Defendant completed her prison term, but her probation was later revoked whereupon she was sentenced to a period of incarceration followed by probation.

The trial court denied defendant credit for the time she had served in prison. We reverse with instructions to the trial court to

give defendant credit for that time. *See Tripp v. State*, 622 So. 2d 941 (Fla. 1993). We further note that she is entitled to receive not only credit for time served but also any earned gain time accrued under the three and a half year sentence pursuant to *State v. Green*, 547 So. 2d 925 (Fla. 1989). We are aware that section 948.06(6), Florida Statutes (Supp. 1990) was enacted to counter *Green*, but her offense was committed before the effective date of the statute. *See Bell v. State*, 610 So. 2d 737 (Fla. 2d DCA 1993).

We also note that under *Summers v. State*, 18 Fla. L. Weekly D2154 (Fla. 2d DCA Oct. 1, 1993), when a defendant's probation is revoked and a new probationary term is imposed, as it was in the instant case, the defendant is entitled to credit on the new sentence of probation for any time previously served on probation. We, therefore, instruct the trial court to give the defendant such credit. However, the defendant is not entitled to credit against his probation sentence for any time spent on community control. *Williams v. State*, 18 Fla. L. Weekly D2286 (Fla. 2d DCA Oct. 20, 1993).

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 proceedings consistent herewith. (FRANK, C.J., DANAHY, J., and LUTEN, CLAIRE K., ASSOCIATE JUDGE, Concur.)

* * *

Criminal law—Sentencing—Trial court erred by increasing legal sentence on one count when amending sentence on second count in response to motion to correct illegal sentence

HAROLD RILEY LANE, Appellant, v. STATE OF FLORIDA, Appellee. 2nd District. Case No. 93-03218. Opinion filed November 24, 1993. Appeal pursuant to Fla.R.App.P. 9.140(g) from the Circuit Court for Lee County; William J. Nelson, Judge.

(PER CURIAM.) Harold Lane appeals the denial of his motion to correct illegal sentence. We reverse.

The appellant pled to two third degree felonies pursuant to an agreement for a twelve-year nonhabitual prison sentence. The court initially sentenced him as a habitual offender to two years in prison on count I, uttering a forged instrument, and to a consecutive ten-year prison sentence on count II, grand theft. As a result of a prior motion for postconviction relief, the court deleted the habitual offender status. Thereafter the appellant filed another motion, correctly contending that the ten-year nonhabitual sentence for grand theft exceeded the statutory maximum. The court then amended his total sentence to two consecutive nonhabitual five-year prison terms.

Increasing the sentence on count I constituted an improper modification of a legal sentence. *See Wilhelm v. State*, 543 So. 2d 435 (Fla. 2d DCA 1989) (while correcting illegal sentence on one count, court may not modify legal sentence on another count). Thus, the court should have corrected the term on count II only, rather than also increase the legal sentence on count I. We therefore strike the sentence of five years imposed on count I and reinstate the original sentence of two years. (SCHOONOVER, A.C.J., and PATTERSON and BLUE, JJ., Concur.)

* * *

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Erica M. Raffel, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4730, on this 18th day of February, 1994.

Respectfully submitted,

JAMES MARION MOORMAN
Public Defender
Tenth Judicial Circuit
(813) 534-4200

CYNTHIA J. DODGE
Assistant Public Defender
Florida Bar Number 345172
P. O. Box 9000 - Drawer PD
Bartow, FL 33830

CJD/dt