FILED
SID J. WHITE
MAR 24 1994
CLERK, SUPREME COURT
By Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

PAUL R. COOK,

Petitioner,

v.

CASE NO. 83,193

STATE OF FLORIDA,

Respondent.

PETITIONER'S INITIAL BRIEF ON THE MERITS

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SECOND JUDICIAL CIRCUIT

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PETITIONER'S INITIAL BRIEF ON THE MERITS

I PRELIMINARY STATEMENT

This is an appeal from the decision of the First District Court of Appeal below, Cook v. State, ___ So.2d ___ 19 Fla.L. Weekly D183) (Fla. 1st DCA Jan. 18, 1994) (opinion on remand).

Petitioner, appellant in the district court and defendant in the circuit court, will be referred to by name or as petitioner. Respondent, appellee in the district court and prosecutor in the circuit court, will be referred to as the state.

While the index to the record indicates that the transcripts had consecutively numbered pages, these numbers do not appear on counsel's copy of the record. Petitioner will refer to the transcript of the sentencing hearing of January 18, 1990, as T1 followed by the page number.

II STATEMENT OF THE CASE AND FACTS

In June, 1989, petitioner, Paul R. Cook, pleaded to five counts in three cases - grand theft, forgery and 3 counts of passing a worthless check. He was placed on 3 years concurrent probation. In January, 1990, Cook was convicted of four new counts - credit card fraud, grand theft and two counts of forgery - and admitted violating probation in the 1989 cases. He was sentenced to 4.5 years in prison on the 1990 cases and was placed on 3 years consecutive probation on the 1989 cases. Cook, 19 Fla.L.Weekly at D183.

In June, 1991, Cook was released from prison and began serving probation on the 1989 cases. In November, 1991, probation was revoked, and he was sentenced to 3.5 years in prison on the 1989 cases. He asked for 4.5 years credit for the sentence he had served on the 1990 cases, but the request was denied. Id. He was given credit for 171 days he had served in jail (R-43). Petitioner's recommended guidelines range was 5-1/2 to 7 years (S-8), and the permitted range went downward to 4-1/2 years (T1-11), the sentence actually imposed in January, 1990.

In its opinion on remand, the First District Court of Appeal noted that, if Tripp, infra, were applied literally, Cook would receive no sanction on the second violation of probation, and held that this court did not intend that result. The district court certified the question, but did not formulate the question.

Notice to invoke was timely filed, and this appeal follows.

III SUMMARY OF ARGUMENT

The issue here is whether Tripp, infra, creates a bright-line rule, or whether there are instances in which Tripp would not apply.

Petitioner contends that the apparently anomalous result here - the inability of the trial court to impose a sentence on a violation of probation if credit must be given for the first term of incarceration - is not necessarily the anomaly it appears to be, and even if it is, results not from a quirk in the law, but from the way the trial court structured the sentence, a method this court has recognized as designed to circumvent the guidelines. Where the result is not anomalous, this court need do nothing to alter Tripp. Even where the anomaly results, it would prevent a sentence on revocation of probation only where the only violations are technical, and applies only to those whose crimes were committed before October, 1989. There is no public policy need for creating confusion and ambiguity in an otherwise bright-line rule.

IV ARGUMENT

ISSUE PRESENTED/CERTIFIED QUESTION

(NOTE: The district court certified a question without formulating the precise question.)
DOES THE HOLDING IN TRIPP REQUIRE THAT CREDIT BE GIVEN FOR TIME SERVED IN PRISON ON EACH CONSECUTIVE SENTENCE IMPOSED UPON REVOCATION OF PROBATION WHEN GIVING SUCH CREDIT RESULTS IN NO SANCTION FOR THE VIOLATION OF PROBATION?

Undersigned counsel will say at the outset that this issue is moot as to petitioner Cook, who has completed the sentence imposed on violation of probation and been released from prison. The issue is nevertheless capable of repetition while evading review in the instant case and should be addressed by this court. See Roe v. Wade, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973).

In Tripp v. State, 622 So.2d 941 (Fla. 1993), the defendant was convicted of burglary and grand theft, two third-degree felonies. He was sentenced to 4 years in prison on the burglary and 4 years consecutive probation on the theft. When he later violated probation, the judge sentenced him to 4-1/2 years in prison with credit for 4 years time served on the theft. The state appealed the award of credit for time served, and the district court vacated the award of credit and certified a question to this court.

This court noted that, even with the one-cell bump-up, the maximum guideline sentence which could be imposed on Tripp was 5-1/2 years in prison. Thus, unless Tripp were given credit for time served on his first incarceration, he would be serving

a total sentence of 8-1/2 years in prison, which was 3 years more than the maximum guideline sentence. 622 So.2d at 942. This court ruled:

> We hold that if a trial court imposes a term of probation on one offense consecutive to a sentence of incarceration on another offense, credit for time served must be awarded on the sentence imposed after revocation of probation on the second offense.

422 So.2d at 942.

The court answered the certified question in the negative, quashed the district court opinion, and disapproved the decisions in Sylvester, Ford, Pacheco, Harris, Folsom and Rodgers. Id. at 942-43. Sylvester v. State, 572 So.2d 947 (Fla. 5th DCA 1990); Ford v. State, 572 So.2d 946 (Fla. 5th DCA 1990); Pacheco v. State, 565 So.2d 832 (Fla. 2d DCA 1990), review denied, 576 So.2d 289 (Fla. 1991); Harris v. State, 557 So.2d 198 (Fla. 2d DCA 1990); State v. Folsom, 552 So.2d 1194 (Fla. 5th DCA 1989); Rodgers v. State, 540 So.2d 872 (Fla. 4th DCA 1989).

This court is not often called upon to resolve intradistrict conflict, but in this case and Bailey v. State, 634 So.2d ____, 19 Fla.L.Weekly D368 (Fla. 1st DCA Feb. 16, 1994), different panels of the First District Court reached opposite conclusions. In Bailey, while noting an anomalous result similar to the one here, the district court nevertheless viewed Tripp as establishing a "bright line rule" and followed it. Id. In the instant case, however, the district court held that

this court could not have intended the anomalous result and affirmed a sentence which violates Tripp.

The anomalous result here - the seeming inability of a trial court to impose a sentence on a violation of probation if credit must be given for the first term of incarceration - is, first, not necessarily the anomaly it appears to be and second, even if it is, results not from a quirk in the law, but from the way the trial court structured the sentence.

As a preliminary matter, it is noteworthy that it appears the anomaly is most likely to arise, perhaps even usually arises, when the second count is a third-degree felony. The anomaly arises when the judge has imposed a sentence of 5 years or more on the first count, and the second count is a third-degree felony, or when the judge imposes a shorter sentence on the revocation of probation than the original sentence. That is, if the judge imposes a sentence of 5 years or more on Count I, and then must give credit for time served on Count II, the result under Tripp would be 5 years on the violation of probation, with credit for time served of 5 years. Or, as here, Tripp results in credit for time served of 4.5 years on a 3.5-year sentence on the revocation of probation.

This apparent anomaly, however, may not be all it appears to be. To explain this phenomenon, it is necessary first to give a short history of the entitlement to credit for gain-time earned in a previous incarceration on a new sentence imposed upon revocation of probation. In State v. Green, 547 So.2d 925 (Fla. 1989), this court held that, upon sentencing after

revocation of probation, a defendant was entitled to credit for all gain-time earned during a previous term of incarceration on the same offense. Such credit did not include, however, provisional credits or administrative gain-time, as those were not earned, but rather, were given to alleviate prison overcrowding. See Tripp, 622 So.2d at 942, n.2. Section 944.275, Florida Statutes, was amended in 1989, so that, for crimes committed after October 1, 1989, upon violation of probation, all gain-time previously earned is forfeited.

While Rodgers predates Green, it illustrates the relevant principle. State v. Rodgers, supra. In 1984, Rodgers was convicted of two counts of indecent assault. He was sentenced to 3-1/2 years in prison on Count I and placed on 5 years consecutive probation on the second. In 1987, he violated probation and was sentenced to 3-1/2 years in prison, with credit for 580 days time served. The 580 days appears to be credit for the time (day-for-day) actually served in prison. The state appealed the granting of credit for time served on Count I on the new sentence on Count II, and pre-Tripp, the state won.

What Rodgers illustrates is that, because inmates receive various kinds of gain-time, some of which they are entitled to credit for under Green, some not, and Green does not apply to any crimes committed after October, 1989 (now more than 4 years ago), a defendant could get exactly the same sentence - 3-1/2 years originally and 3-1/2 years on violation of probation - and still serve time on the new sentence. Ergo, the apparent anomaly is not necessarily all that it appears to be.

Cook's offenses date from 1989, that is, they predate the amendment of section 944.275 that forfeits all gain-time upon violation of probation. Therefore, it appears he would not have served any more time on the 3-1/2-sentence on the revocation of probation had he been given credit for the 4-1/2-year term previously served. It is not clear whether this would be true, however, had he forfeited all gain-time. It is not possible on the present record to determine whether Cook would have had to serve an additional term of incarceration had he forfeited all gain-time.

Cook's offenses predate the amendment of section 944.275, and thus, he gets credit for all gain-time earned. Nevertheless, it is important to remember that this case has been on appeal since January, 1992 (R-92), more than two years ago. With the passage of time, fewer and fewer cases will involve crimes that predate October, 1989. That is, the typical probation violator now, or soon, will forfeit all gain-time earned, and thus, will not be in the same position as petitioner Cook. This court should recognize that either already or soon, Cook's situation will be the anomaly; it will not be typical.

Even if Tripp results in preventing a trial court from imposing a sentence on revocation of probation, this results not from a quirk in the law, but from the way the trial court structured the sentence. This court called this sentencing method "inconsistent with the intent of the guidelines." The court said:

> Under this method, trial judges can easily circumvent the guidelines by imposing the maximum incarcerative sentence for the primary offense and probation on the other counts. Then, upon violation of probation, the judge can impose a sentence which again meets the maximum incarcerative period. Without an award of credit for time served for the primary offense, the incarcerative period will exceed the range contemplated by the guidelines.

Tripp, 622 So.2d at 942. Similarly, in Poore v. State, 531 So.2d 161, 165 (Fla. 1988), this court held:

> 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 suggestions that the guidelines do not limit the cumulative prison term of any split sentence upon a violation of probation. To the contrary, the guidelines manifestly are intended to apply to any incarceration imposed after their effective date, whether characterized as a resentencing or a revocation of probation. They thus must be applied to the petitioner. . . albeit within the context of the previously imposed true split sentence.
>
> To hold otherwise would permit trial judges to disregard the guidelines merely by imposing a true split sentence. . .

The court continued with this example:

> For example, in a case where the statutory maximum was 25 years and the guidelines range 5 to 7 years, a trial court could impose a split sentence of 25 years, with the first 7 years to be served in prison and the remaining 18 suspended, with the defendant on probation. Upon violation of probation, the trial court then could simply order the incarceration of the defendant for the balance of the 18-year probationary period, notwithstanding any lesser recommended guidelines range. Such an analysis not only would defeat the purpose of the sentencing guidelines, it would

> destroy them all together. Obviously, this result was never intended. . .

Id.

While not all judges who impose such sentences (consecutive probation) do so purposefully in order to circumvent the guidelines, some surely do. Some judges impose such sentences and prosecutors request such sentences for the purpose of circumventing the guidelines. This court's decision in Tripp, in turn, thwarts this illegitimate purpose. Unless this court adheres to Tripp, however, it could be put in the position of approving clever attempts to circumvent the guidelines. This would not be a good policy.

In approving a sentence which would have been disapproved by Tripp, the Fifth District said:

> This case is still another example of the traps into which the unwary may stumble in sentencing under the guidelines rules. The traps do not discriminate; either a defendant or the state may fall into one.

Ford, supra, 572 So.2d at 946-47. In 1987, Ford was convicted of two counts each of theft and dealing in stolen property in two separate cases. He was sentenced to 9 years in prison on one case and 10 years consecutive probation on the second. When he later violated probation, he was sentenced to 12 years in prison with no credit for time served.

The district court noted the anomaly that, had he been sentenced to prison on both cases originally, the sentence which could have been imposed on the violation of probation would have been 12 years, but with credit for 9 years served.

Despite the fact that the total 21-year sentence imposed was close to double what the guidelines permitted, the district court approved the sentence, calling the way in which the sentence was structured a "clever use of the tool of probation," and ended with a few remarks disparaging Ford's inability to fulfill the conditions of probation. Id. at 947.

The intent of the guidelines, and this court, is fairness in sentencing, not rewards for cleverly evading the intended fairness of the guidelines. Petitioner urges this court to adhere to Tripp as creating a bright line rule. It is also a warning to trial judges to take care in structuring sentences on multiple counts. If Tripp is not a bright-line rule, then this court is going to have to decide many more cases, in which various sentences structures are tried, to decide whether Tripp really applies or not.

As a matter of policy, Tripp is acceptable as a bright-line rule. In discussing violations of probation, it is sometimes easy to forget that they are not for new crimes. Even when the violation includes a new crime, the sentence on the violation is for an old crime, not the new one. There are two types of violations of probation - either the defendant commits new crimes, or he commits technical violations. Petitioner Cook committed some of both. If the defendant commits a new crime, he can be prosecuted and punished for that crime, and Cook apparently was. A limitation on the sentence for violation of probation does not preclude punishment for new crime. If the defendant commits only technical violations, there comes

a point at which this court should ask itself how much protection for invalid sentence structuring it is willing to provide for such violations as failure to report or the failure of indigent defendants to pay money.

Petitioner urges this court to hold that Tripp is a bright-line rule, which warns judges how not to structure sentences. If it is not a bright-line rule, then it will generate many more appeals before its contours are well defined, and for what? To allow trial courts, some of whom structured sentences intentionally to evade the guidelines, to continue to exceed the guidelines on violations of probation. There is no public policy need for this.

The least this court should do is hold that the total sentence imposed on all counts initially and upon revocation of probation cannot exceed the guidelines. It is not clear from this record whether Cook's total sentence exceeded the guidelines or not. If it did, the excess portion should be vacated, but for the fact that it is moot. Moreover, if Tripp is not a bright-line rule, and a trial court need not give credit for all time served on prior incarcerations, not only can the sentence imposed not exceed the guidelines, it must also comply with certain other caveats. For example, the sentence on violation of probation cannot exceed the one-cell bump-up provided by the guidelines rule. Lambert v. State, 545 So.2d 838 (Fla. 1989); Rule 3.701(d)(14), Fla.R. Crim.P. Nor can the total probation imposed exceed the statutory maximum. Summers v. State, 625 So.2d 876 (Fla. 2d DCA 1993) (en banc).

Petitioner, however, urges this court to hold that Tripp is a bright-line rule. To hold otherwise will be to cause many other appeals to delineate the rules as to when Tripp applies and when it does not, even though, in the aggregate, the number of times it would not apply, even under the state's best case scenario is limited, and as it applies only to cases with only technical violations of probation, it is unnecessary as a matter of policy. As the First District said in Bailey, a bright line rule "simpli[fies] the application of sentencing guidelines and avoid[s] confusion arising from the varying circumstances that can occur in different cases." 19 Fla.L.Weekly at D368.

V CONCLUSION

Based upon the foregoing argument, reasoning, and citation of authority, petitioner requests that this court quash the decision of the First District Court below and order that the sentence imposed upon revocation of probation comply with Tripp.

Respectfully submitted,
NANCY A. DANIELS
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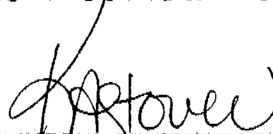
SECOND JUDICIAL CIRCUIT



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Wendy S. Morris, Assistant Attorney General, by delivery to The Capitol, Plaza Level, Tallahassee, Florida, and a copy has been mailed to Mr. Paul R. Cook, 2733 E. Overlook Road, Cleveland, OH 44106, this 24 day of March, 1994.

KATHLEEN STOVER