IN THE SUPREME COURT OF FLORIDA

PAUL R. COOK,

Petitioner,

v. CASE NO. 83,193

STATE OF FLORIDA,

Respondent.

_____/

RESPONDENT'S BRIEF ON THE MERITS

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TABLE OF CITATIONS

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RESPONDENT'S BRIEF

PRELIMINARY STATEMENT

Petitioner, PAUL R. COOK, defendant below, will be referred to herein as "Petitioner." Respondent, the State of Florida, will be referred to herein as "the State." References to the record on appeal will be by the use of the symbol "R1" followed by the appropriate page number(s). References to the supplemental record will be by the use of the symbol "R2" followed by the appropriate page number(s). References to the January 18, 1990 sentencing hearing will be by the use of the symbol "S1" followed by the appropriate page number(s). References to the November 22, 1991 violation of probation hearing will be by the use of the symbol "V" followed by the appropriate page number(s). References to the December 5, 1991 sentencing hearing will be by the use of the symbol "S2" followed by the appropriate page number(s).

STATEMENT OF THE CASE AND FACTS

The State accepts Petitioner's statement of the case and facts as reasonably accurate with the following additions:

(1) When Petitioner was sentenced in January 1990, he was sentenced based on a single scoresheet which listed his new and old offenses (R2 7). Cook's recommended range was five and one-half to seven years' incarceration (R2 7). At the hearing, no mention was made of the bump-up provision for violations of probation contained in Florida Rule of Criminal Procedure 3.701(d)(14) (S1).

(2) At the December 1991 sentencing hearing, no mention was made of the bump-up provision for violations of probation (S2).

SUMMARY OF ARGUMENT

Petitioner is not entitled to credit the time served on one offense against the incarceration imposed after revocation of probation on a second offense when the two offenses arose from separate criminal episodes. The principles of Tripp v. State, 622 So. 2d 941 (Fla. 1993), do not apply when incarceration is imposed upon a defendant in 1990 for new offenses independent of original convictions entered in 1989.

ARGUMENT

ISSUE

WHETHER PETITIONER IS ENTITLED UNDER TRIPP TO CREDIT THE TIME SERVED ON ONE OFFENSE AGAINST THE INCARCERATION IMPOSED AFTER A REVOCATION OF PROBATION ON A SECOND OFFENSE, WHEN THE TWO OFFENSES AROSE FROM SEPARATE CRIMINAL EPISODES.

In June 1989, Cook was sentenced to three years' concurrent probation as to several offenses. In January 1990, Cook was convicted of two new offenses, his probation was revoked as to his earlier offenses, and he was again placed on probation for the earlier offenses. As to the new offenses, Cook was sentenced to concurrent terms of four and one-half years' incarceration. The probationary terms of the original offenses were to be served consecutively to the incarceration. At the January 1990 sentencing hearing, the court utilized one scoresheet for the new and old offenses (R2 7). After Cook served the incarcerative portion, he violated his probation. The trial court revoked his probation for the second time in November 1991, and the court imposed a three and one-half year term of incarceration.

Florida Rule of Criminal Procedure 3.701(d)(1) provides that "[o]ne guideline scoresheet shall be utilized for each defendant covering all offenses pending before the court for sentencing." In State v. Stafford, 593 So. 2d 496, 497 (Fla. 1992), this Court held that when probation violation

cases are being sentenced in conjunction with new substantive offenses, multiple scoresheets are to be prepared to determine the most severe sanction. Once the scoresheet with the most severe sanction is determined, that is the scoresheet to be used to sentence the defendant. Id. Where there are multiple violations of probation, the sentences as to those offenses may be successively bumped to one higher cell or guidelines range for each violation. Williams v. State, 594 So. 2d 273, 275 (Fla. 1992). Sentencing on the new offenses will proceed according to the guidelines and other applicable statutes. Grady v. State, 618 So. 2d 341, 344 (Fla. 1993). In the present case, the trial court correctly utilized one scoresheet to sentence for the new and old offenses in January 1990. However, in December 1991, the trial court departed downwardly from the guidelines range without written reasons by imposing three and one-half years' imprisonment. In addition, no mention was made at this hearing of the bump-up provision of Florida Rule of Criminal Procedure 3.701(d)(14). Taking into account a two cell bump-up for two violations of the probation on the old offenses, Cook's permitted range increased to seventeen years' incarceration. See Fla.R.Crim.P. 3.988(f).

Cook contends that this Court's decision in Tripp v. State, 622 So. 2d 941 (Fla. 1993), requires that, as to the three and one-half year term of incarceration as to his 1989 offenses, he be given credit for the four and one-half

years' served on his 1990 offenses. Tripp pled guilty to the offenses of burglary and grand theft. Id. at 941. The trial court imposed four years' incarceration followed by four years' probation. Id. Tripp served the incarceration, and then violated his probation. Id. The trial court then sentenced Tripp to four and one-half years' imprisonment with credit for the four years previously served. Id. This Court held that Tripp was entitled to such credit, stating:

> The purpose of the sentencing guidelines is "to establish a uniform set of standards to guide the sentencing judge in the sentence decision-making process" so as to eliminate unwarranted variation in sentencing. Fla.R.Crim.P. 3.701(b). One guidelines scoresheet must be utilized for all offenses pending before the court for sentencing. Fla.R.Crim.P. 3.701(d)(1). A sentence must be imposed for each separate offense, but the total sentence cannot exceed the permitted range of the applicable guidelines scoresheet unless a written reason is given. Fla.R.Crim.P. 3.701(d)(12). Sentences imposed after revocation of probation must be within the recommended guidelines range and a one-cell bump. Fla.R.Crim.P. 3.701(d)(14).
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> The State argues that Tripp was convicted of two separate crimes and received two separate sentences. Thus, Tripp is not entitled to credit for time served on his first conviction after revocation of probation on his second conviction. The State, however, ignores the fact that both offenses were factors that were weighed in the original sentencing through the use of a single scoresheet and must continue to be treated in relation to each other, even after a portion of the

> sentence has been violated. (Citations omitted).

Id. at 942.

Tripp involves a single sentencing guidelines scoresheet showing a guidelines range within which a non-departure sentence must be imposed. Tripp pled guilty to two third degree felonies which statutorily authorized ten years incarceration if imposed consecutively. However, the maximum incarcerative period under the guidelines was 4.5 years. He was sentenced to four years incarceration and four years probation. After serving his incarceration, Tripp violated probation. Consistent with double jeopardy, Tripp could have been sentenced to any statutorily authorized sentence which could have been imposed at the original sentencing hearing, i.e., ten years incarceration if the two sentences were imposed consecutively, provided he received credit for time previously served. Double jeopardy requires that credit be given for time previously served, otherwise the resentence would violate double jeopardy by punishing the same offense(s) twice. However, because the sentencing guidelines also place upward limits on incarceration, Tripp could only be sentenced to the next higher cell of 5.5 years incarceration provided credit was given for the time previously served. This Court correctly recognized that the sentencing guidelines statute required that the resentence be within the sentencing guidelines, with a one cell bump, and that credit be given for time

previously served. However, what the Court did not state but which is nevertheless true, is that the double jeopardy clause also requires that credit be given for time previously served when a defendant is resentenced for the same offenses. Unless a second (re)sentence incorporates a previous sentence, there will be double punishment for the same offense(s).

Tripp and its principles do not apply when a defendant, such as Cook, is sentenced for the first time for convictions which were entered in January 1990, independent of the original convictions entered in 1989[1]. After Cook completed service of the 4.5 years incarceration for his 1990 convictions, he violated the probation imposed for his 1989 convictions. (For purposes of resentencing, the sentences on the 1990 convictions had been completed and these convictions were not subject to resentencing.) At that point, upon resentencing for his 1989 convictions based on his second violation of probation, Cook could have been resentenced to any statutorily authorized sentence(s) for the convictions entered in 1989 which fell within the 1989 sentencing guidelines scoresheet with a two cell bump for the two subsequent violations of probation provided he was given credit for time served on any of the 1989 convictions.

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[1]The 1989 convictions were used in computing the 1990 sentencing guidelines scoresheet but that does not mean that the 1989 sentences had to be credited for the 1990 convictions and sentences. If it did, then all convictions carried on scoresheets as prior records would entitle the defendant to credit for time served on the prior record.

There was no incarceration on these 1989 convictions, thus there was no credit to be given for the purposes of determining guidelines sentencing[2].

Neither Tripp nor double jeopardy require that Cook be given credit for the 4.5 years incarceration which he has previously served on the 1990 convictions. The district court intuitively recognized that granting credit for time served on other convictions entered at separate sentencing hearings would be an unwarranted windfall to the criminal which would be inconsistent with the sentencing guidelines and other law governing sentencing.

> To allow Cook 4.5 years credit, for time served on the 1990 offenses, on the concurrent 3.5 year sentences imposed for the 1989 offenses after he twice violated his probation for those offenses, would result in no sanction for the second violation of probation. Surely the sentencing guidelines do not intend such a result.

Cook v. State, 19 Fla. Law Weekly D183 (Fla. 1st DCA January 18, 1994).

For the above reasons, the district court decision should be affirmed and the certified question answered accordingly.

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[2]The time served on probation for the 1989 convictions would count toward the statutorily authorized maximums for the 1989 convictions because the Legislative limits on sentences include both incarceration and probation, e.g., a third degree felony is limited to either five years incarceration or probation, or a combination of both. However, probation does not count for the purposes of computing time served within the guidelines.

CONCLUSION

Based on the foregoing legal authorities and arguments, Respondent respectfully requests that this Honorable Court affirm the decision of the First District Court of Appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Kathleen Stover, Assistant Public Defender, Second Judicial Circuit, Leon County Courthouse, Fourth Floor North, 301 South Monroe Street, Tallahassee, FL 32301, this 9th day of May, 1994.

Wendy S. Morris
Assistant Attorney General