IN THE SUPREME COURT OF FLORIDA

PAUL R. COOK,

Petitioner,

v.

CASE NO. 83,193

STATE OF FLORIDA,

Respondent.

PETITIONER'S REPLY BRIEF ON THE MERITS

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PETITIONER'S REPLY BRIEF ON THE MERITS

I SUMMARY OF ARGUMENT

The state makes a distinction between the instant case and Tripp, infra - that petitioner was being sentenced for crimes committed at separate times and Tripp was not - which petitioner asserts is specious and meaningless in the context of Tripp. The state's argument did point out an anomaly in the sentencing guidelines procedure when both new offenses and violations of probation are being sentenced, an anomaly which this court has never fully resolved.

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 anomaly results, its

existence is limited to only those whose crimes were committed before October, 1989. There is no public policy need for creating confusion and ambiguity based on a very limited exception in an otherwise bright-line rule.

II 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?

Counsel takes this opportunity to correct a factual error in the initial merit brief. While petitioner Cook has been released from prison in Florida, it was only to be transferred to prison in Alabama, where he remains at this writing.

To repeat briefly, Cook was placed on probation for three offenses in June, 1989. He then violated probation by committing new offenses. In January, 1990, he was sentenced on both the violation of probation (VOP) and the new offenses. The sentences were 4-1/2 years in prison on the new offenses and consecutive probation on the probation revocation of the June, 1989, offenses. In 1991, Cook again violated probation and was sentenced to 3-1/2 years in prison on the 1989 offenses with no credit for time served. He asks for credit for the 4-1/2 year sentence he previously served.

On appeal to this court, the state makes the specious and misleading argument that petitioner is not entitled to credit for time served, because the January, 1990, prison term pertained solely to new offenses and did not "count" as a sentence as to the 1989 offenses on which probation was violated in January, 1990 and again in 1991 (State's Brief (SB), pp. 8-9).

This is a factual distinction between Tripp and the instant case, but it is a distinction which makes no difference. Tripp v. State, 622 So.2d 941 (Fla. 1993).

The speciousness of this argument is in the fact that the state could make the same argument in every case of a prison term on one count and consecutive probation on a second count, which is exactly the issue addressed in Tripp. To buy the state's argument that Cook is not entitled to credit for the 1990 prison term, this court must first accept the state's premise that, because he was again placed on probation, Cook was not actually sentenced in accordance with the sentencing guidelines on the '89 cases in January, 1990. This argument is wholly meritless. The state has focussed on an unusual, but meaningless, fact to achieve the end it desires.

Convictions which are unrelated except for having the same defendant can be sentenced together. This happens all the time, as this court well knows. See, e.g., Ford v. State, 572 So.2d 946 (Fla. 5th DCA 1990) (defendant convicted of theft and dealing in stolen property in each of two separate cases); Sylvester v. State, 572 So.2d 947 (Fla. 5th DCA 1990), both of which were overruled in Tripp. For example, a defendant may have committed 10 burglaries or 10 robberies over a period of weeks or months, but if they are all ready for sentencing at one time, they will all be sentenced at one time, using one scoresheet. Clark v. State, 572 So.2d 1387 (Fla. 1991).

If the court places this hypothetical defendant on probation on some charges and consecutive probation on others, if

the defendant were to violate probation, under Tripp, the court would have to give credit for time served on a new term of incarceration on a revocation of probation. This result is not different because new offenses and a violation of probation are both sentenced at the same time. Both are still being sentenced at the same time, that is, one scoresheet took both the new offenses and the prior offenses into account, however that was done. As a result, the defendant would be entitled to credit for time served on a successive probation violation. As this court said in Tripp:

> 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. (emphasis added)

622 So.2d at 942. This is equally true of Cook's '89 and '90 offenses here.

Placing a defendant on probation, even for a second time, is still a sentence for purposes of Tripp, and the trial court has to give credit for time served for any prior term of incarceration. The court should note that the state framed the issue as:

> 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 episodes.

(SB-4). As petitioner just said, offenses from separate episodes are sentenced together all the time; this is not a meaningful distinction between Tripp and the instant case.

The state adds a further outrageous claim in a footnote:

> The 1989 convictions were used in computing the 1990 sentencing guidelines scoresheet, but that does not means 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.

(SB-8, n.1). Of course, this is untrue. This argument again assumes Cook was not "sentenced" in January, 1990, on the 1989 VOPs. If he were not then being sentenced on the 1989 violations, then they were merely garden-variety prior record, and, if that were true, he would not be entitled to credit for time served on "prior record" convictions which were not then being sentenced. But the VOPs which were being sentenced at the same time obviously were not garden-variety prior record for the simple reason that the judge was imposing sentence on them at the very same time.

On the other hand, the state's argument does point up an anomaly which this court has never resolved, not in Lambert and not even in Stafford. State v. Stafford, 593 So.2d 496 (Fla. 1992); Lambert v. State, 545 So.2d 838 (Fla. 1989). In Stafford, this court held that one scoresheet is to be used, even when sentencing on new offenses and a violation of probation at

the same time. Despite Justice Kogan's attempt to resolve this issue in his dissent in Stafford, the majority has not done so.

The anomaly unresolved in Stafford is between the premise of the bump-up for violation of probation provision of Rule 3.701(d)(14), Florida Rules of Criminal Procedure, and the convolutions which result when the probationary offense is not scored as the primary offense at sentencing. The Rule 3.701-(d)(14) bump-up is premised on using at the VOP the same scoresheet used in the original sentencing procedure. The consequence of using the original scoresheet is that subsequent offenses cannot be included, nor can points be added for legal constraint (assuming they did not exist in the original).

Stafford requires one scoresheet to be used for both a VOP and new offenses sentenced at the same time, but does not address the consequences of this decree. The first consequence is that the bump-up will not be from the same presumptive sentence on which the original sentence was premised, with all the potential for unfairness that implies. Using a single subsequent scoresheet premised on new convictions adds points for the new convictions and also permits legal constraint to be scored, which it could not be on the original scoresheet. In other words, more points are added to the original scoresheet, upon which Rule 3.701(d)(14) is premised, and then it is bumped-up (presumably).

In Stafford, this court posed a hypothetical in which a defendant is convicted of armed sexual battery, with a presumptive guidelines sentence of 4-1/2 to 9 years (permitted range),

but despite the recommendation for prison, is placed on probation only. The defendant then violates probation by committing grand theft. Assuming the theft must be counted as primary offense, that would leave the armed sexual battery as prior record, and even adding legal constraint points and the one-cell bump-up, according to the court's calculations, for violation of probation on armed sexual battery, the defendant could be sentenced only to 2-1/2 to 5-1/2 years, arguably better off after violating probation and committing a new crime, than if he had been sentenced to prison initially.

In his dissent, Justice Kogan suggested the use of two scoresheets, resulting in a permitted range of 5-1/2 to 12 years (including bump-up) on the sexual battery and up to 4-1/2 years (no bump-up) on the theft. Justice Kogan further theorized that these sentences could be stacked, resulting in a "total sentence without departure of as much as sixteen and a half years" (emphasis in original). Stafford, 593 So.2d at 499 (Kogan, J., dissenting). Petitioner believes both models leave something to be desired.

First of all, in the extensive, albeit anecdotal, experience of undersigned counsel, the typical armed rapist, even a first-time offender (as assumed in this court's hypothetical) is seldom going to receive a probation-only sentence. He is far more likely to be sentenced to the high end of the guidelines range, with a term of probation to follow, and that is how the VOP will arise. (And why Tripp may be necessary if there were multiple counts, with probation consecutive to

imprisonment on other counts.) The court may view the issue differently where the VOP follows a previous prison sentence than when it does not. Moreover, this court need not go to great lengths to guard against conceivable, but improbable, sentencing scenarios.

Second, while this may be a minor point, it is difficult to imagine that some degree of victim injury, since it includes the degree of sexual contact, would not be scored in armed sexual battery. Even "contact but no penetration" would place the hypothetical defendant in the next higher cell - a permitted range of 7 - 17 years - than the court assumed. Rule 3.988, Fla.R.Crim.P. (Category 2).

This court was concerned about the effect when a serious crime is followed by violating probation by committing a relatively minor crime. The result is not less unjust, however, than if the theft were followed by the sexual battery, and the sexual battery were scored as primary offense. This scenario could easily result in the maximum sentence on the theft, where the theft is a relatively minor element in the picture.

Petitioner would also reiterate the argument made in his initial merit brief that, in considering this question, this court should not lose sight of the fact that the violation is not for committing the sexual battery, but for committing the theft. That is, what is wrong with a relatively mild sentence, which is in reality based on the new crime, not the old?

Petitioner believes this court should reconsider and perhaps refine Justice Kogan's model of using two scoresheets.

Petitioner disagrees with Justice Kogan's model, however, insofar as it proposes that the sentences from the two scoresheets can be stacked. That result is hardly less anomalous than the other solutions that have been posed. Petitioner proposes that two scoresheets be used, the one resulting in the higher sentence be used, and the offenses appearing only on the discarded scoresheet be added to the one used, as either additional offenses or prior record, as applicable.

This court may or may not wish to readdress the scoresheet issue. 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 mainly 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." Bailey v. State, 634 So.2d 171 (19 Fla.L.Weekly D368) (1st DCA), review dism., no. 83,253 (Fla. March 18, 1994).

III 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,
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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, Limestone Correctional Facility, P.O. Box 66, Capshaw, AL 35742, this 3 day of June, 1994.

KATHLEEN STOVER