IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v. CASE NO.: 83,280

MARK THOMAS WARDELL,

Appellee.

_____/

ON DISCRETIONARY REVIEW FROM
THE FIFTH DISTRICT COURT OF APPEAL

PETITIONER'S BRIEF ON THE MERITS

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STATEMENT OF CASE AND FACTS

The Respondent in this case appealed his three sentences for violation of probation. He was originally charged in case 91-1204 with resisting an officer with violence. (R 115). In case 91-1417, he was charged with burglary of a dwelling and grand theft, and in case 91-1602, he was charged with two counts of burglary of a structure, two counts of grand theft, and with racketeering. (R 1-5, 162).

Except for the racketeering offense, the Respondent pled nolo contendere to all the charges. (R 297-311). He was sentenced on these cases on the 2nd of March 1992. (R 262-283). On case 91-1204 the court sentenced the Respondent to five years probation. (R 137-141, 182-185, 275-279). The court also sentenced the Respondent to five years probation on the four counts in 91-1602 with the four counts concurrent to each other but consecutive to the five years imposed in 91-1204.[1]

On the 2nd of July 1992, an affidavit of violation of probation was filed in cases 91-1602 and 91-1204. (R 67-68, 142-143). The action which caused the violation led to the new charge of carrying a concealed firearm in case 92-974. (R 215). At the violation hearing held on the 21st of October 1992, the Respondent admitted the violation. (R 336-337). On the 11th of December 1992, the trial court sentenced him to concurrent five year terms of probation on the new charge and on the violation in

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[1] A clerical error was raised as to the sentence in 91-1417 which was addressed by the district court; however, the facts of that case are not relevant to the issue involved in the certified question.

91-1204 to be followed by five years of probation for the violations in 91-1602. (R 354-355, 90-110, 155-160, 202-212, 234-239).

The Respondent appealed his sentences asserting that he had already served part of his original five years of probation and that the imposition of a new five years probation for the violations in the third degree felonies constituted an illegal sentence. The Fifth District Court of Appeal agreed and held that the trial court must credit a defendant with the time he had already served on probation. Wardell v. State, 19 Fla. L. Weekly D257 (Fla. 5th DCA Feb. 4, 1994). However, the district court did determine that the issue was one of great public importance and certified the issue which led to this petition.

SUMMARY OF ARGUMENT

The term of probation imposed in this case was a legal one supported by both statutory and case law. While there is case law holding that upon a violation of probation a defendant should receive credit for time served previously, such case law is contradictory to previous cases out of this Court and contradictory to the controlling statute. Upon a violation of probation, a judge may impose any sentence that he could have imposed originally. This should include probation without regard to credit for time previously served. While the initial sentence is restricted by statutory maximums, a trial court should have the discretion to impose new probation once there is a violation without concern about the effects of the time previously completed on probation.

ARGUMENT

POINT OF LAW

THE SENTENCE IMPOSED BY THE TRIAL COURT WAS LEGAL AND IS AUTHORIZED BY STATUTORY AND CASE LAW.

The Respondent in this case received five years of probation on a third degree felony. Within about four months, he violated his probation by committing a new offense and was given a new term of five years probation. The issue under review is whether he is entitled to credit for the time served on probation off of his new term of probation. The State's position is that both case and statutory law support the approach that such credit should not be given to defendants who are found in violation of their probation.

First, a probationary term is not a sentence. Villery v. Florida Parole & Probation Comm'n, 396 So. 2d 1107 (Fla. 1980). It is a less harsh sanction imposed upon a defendant instead of a sentence of incarceration. The granting of probation is dependent on legislative and judicial grace. Watkins v. State, 368 So. 2d 363, 366 (Fla. 2d DCA 1979). The burdens of compliance with the conditions of probation are slight in comparison to the alternative of imprisonment. Id. Probation is the least restrictive means to ensure supervision over a defendant who has committed an offense. An initial term of only probation may be imposed by a judge after he has considered both the quantity and quality of the offenses committed by a defendant, or a probationary split sentence is often imposed to help ensure not only that a defendant pays his restitution to

victims but also that he completes some version of rehabilitative counseling.

The initial term is limited by the statutory maximum for whatever degree offense the defendant has committed. However, the issue becomes more difficult when considering the possible sentence if a defendant violates his probation.

Section 948.06(1), which is entitled: "Violation of probation or community control; revocation; modification; continuance; failure to pay restitution or cost of supervision", provides as follows:

> 948.06(1)
> ...The court, upon the probationer or offender being brought before it, shall advise him of such charge of violation and, if such charge is admitted to be true, may forthwith revoke, modify, or continue the probation or community control or place the probationer into a community control program. If probation or community control is revoked, the court shall adjudge the probationer or offender guilty of the offense charged and proven or admitted, unless he had previously been adjudge guilty, and impose any sentence which it might have originally imposed before placing the probationer on probation or the offender on community control. ...

(emphasis added).

The Florida Supreme Court held in Poore v. State, 531 So. 2d 161, 164 (Fla. 1988), that there are five basic sentencing alternatives: 1) confinement, 2) a true split sentence, 3) a probationary split sentence, 4) a Villery sentence[2], and 5)

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[2] Villery v. Florida Parole & Probation Comm'n, 396 So. 2d 1107 (Fla. 1981). When the Court cited Villery in Poore, it noted

probation. The last four of these involves some form of probation. If a true split sentence were originally imposed, the trial court could only give the defendant new incarceration which did not exceed the suspended portion of the sentence. However, if a defendant violates his probation in alternatives (3), (4), and (5), the Court specifically held that section 948.06(1) permits the sentencing judge to impose any sentence which might have originally been imposed. Id.

In the situation of a probationary split sentence, a court can impose a five year prison sentence for a third degree felony even though the defendant had already served part of a term of probation. See, Ramey v. State, 546 So. 2d 1157 (Fla. 5th DCA 1989). To consider statutory maximums and not to allow prison to be imposed in such cases would mean that a trial court would be awarding probation time served as credit off of a sentence of incarceration for the violation.

Since imposition of a prison sentence of up to the statutory maximum is possible for a violation of probation, the same reasoning should apply in cases in which the trial court does not impose prison, and, instead, imposes either new probation or community control. In the case of Quincutti v. State, 540 So. 2d 900 (Fla. 3d DCA 1989), the Third District agreed with this logic and relied upon Poore. Much like in the instant case, the defendant was sentenced to five years probation on a third degree felony. Id. at 901. After serving four and one-half years, he

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that Judge Cowart had correctly stated that upon violation of a Villery sentence the defendant could be sentenced to any sentence which originally could have been imposed.

violated probation, and the trial court sentenced him to one year community control. Id. The defendant argued that this exceeded the statutory maximum, but the appellate court affirmed the sentence citing Poore and section 948.06. Id.

This same reasoning is implicit in the holding of the Fifth District's case of Ricketson v. State, 558 So. 2d 119 (Fla. 5th DCA 1990), in which the defendant argued that the trial court lost jurisdiction over a 1981 case in which he had violated community control and probation five times. To support his claim, he asserted that because he had been on probation in excess of five years this exceeded the statutory maximum. Id. This court disagreed with the defendant's argument holding that the probation violation affidavits were sworn to and filed for each violation before the defendant had successfully completed his probation. Id. A logical deduction from this ruling is that since Ricketson's probation was timely revoked his new probation was not affected by the statutory limits. Like in Ricketson, the affidavits in appellant's case were sworn to and filed before he had completed his probation.

In a footnote the court in Ricketson cited the case of Blackburn v. State, 468 So. 2d 517 (Fla. 2d DCA 1976), in which the affidavit was not filed before the period of probation expired. Id. at 119, n. 2. In the primary case relied upon by Respondent at the district court level of Ogden v. State, 605 So. 2d 155 (Fla. 5th DCA 1992), along with Kolovat v. State, 574 So. 2d 294 (Fla. 5th DCA 1991), the Fifth District Court of Appeal again, cited Blackburn, this time as supporting the position that

probation cannot be extended beyond the statutory maximum. Ogden, at 158. It is correct that in Blackburn, the case of Watts v. State, 328 So. 2d 223 (Fla. 2d DCA 1976), is quoted as holding that "a court is...powerless to extend a period of probation beyond the maximum permissible sentence except as expressly provided in that statute." However, review of Watts shows that it was not a sentence for violation of probation. Instead, the defendant was being sentenced to six years probation on his original sentence for a third degree felony. Watts, supra.

Petitioner agrees that a sentence cannot be imposed for violation of probation unless the process of revocation had begun prior to the expiration of the probation. The State, also, agrees that at the time of the original sentence the trial court cannot impose a period of probation that exceeds the statutory maximum. However, neither of those situations applies to Respondent's case.

The Second District Court of Appeal has recently addressed this same issue and used a slightly different means to reach the same result. In the case Summers v. State, 625 So. 2d 876 (Fla. 2d DCA 1993), the appellate court held that a defendant could be given any term of probation that he could has received originally; however, in order not to exceed the statutory maximum, the trial court must award the defendant credit for time previously served on probation. Judge Schoonover raises several interesting points in dissent as to the logic of the approach by the majority. Id. at 880-882. Included in his dissent was the

discussion of a case where the defendant wanted to pay his restitution imposed as a condition of probation but who had run out of time. Id. at 881. The trial court could revoke probation and sentence the defendant to prison but could not simply impose a term of probation since the statutory maximum would be exceeded. The remedy allowed by law - any sentence the court could originally have imposed - and the remedy desired by both defendant and State is impossible given the approach of the majority in Summers.

A further example of the difficulties with the approach of awarding probationary credit can be seen when examining the situation where the defendant commits a third degree felony. Originally, the options available to the trial court were prison, probation, or both.[3] Regardless of which option is chosen, the maximum sentence is five years. However, upon violation of probation if imposed, the court can impose prison which when combined with previous probation exceeds the statutory maximum. Therefore, while the trial court has initially to consider the statutory maximum of prison combined with probation, once a violation occurs the trial court has the additional freedom to punish a violation with prison. If the probation precedes the prison, it has no affect on the statutory maximum once a violation occurs. The only exception to the approach is if the

[3] This example excludes the application of the guidelines and the option of community control since the point is the same without their consideration.

trial court attempts to impose only probation and not prison. The necessity for such an approach is hard to find.

To limit a court's power in a manner set out in cases like Ogden and Summers has the effect of granting a defendant credit for time previously served on probation or community control whenever some incarceration is not imposed. If a defendant violated a five year probation during the 364th day of the fourth year, the trial court could sentence the defendant to prison as allowed in Ramey, but not to probation alone.[4] While of the two sentencing alternatives, this leaves the greater penalty in the hands of the trial court, it is the State's position that the statute grants the trial court a choice in those situations where a defendant violates probation which is derived from probationary split sentences, Villery sentences, or probation by itself.

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[4] Expect perhaps for 1 day of probation.

CONCLUSION

Based on the arguments and authorities presented herein, the Petitioner respectfully prays this honorable Court reverse the decision of the appellate court in regards to the issue before this Court.

Respectfully submitted,

ROBERT A. BUTTERWORTH
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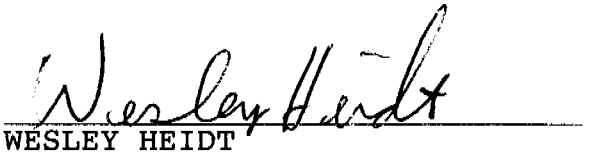

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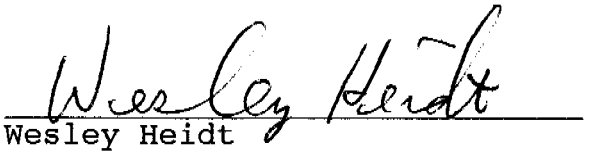
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above Answer Brief has been furnished by delivery to Kenneth Witts, Assistant Public Defender, 112 Orange Ave., Ste. A, Daytona Beach, FL 32114, this 5th day of April 1994.



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