IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

versus

MARK THOMAS WARDELL,

Respondent.

S.CT. CASE NO. 83,280

DCA CASE NO. 93-143

ON DISCRETIONARY REVIEW FROM
THE FIFTH DISTRICT COURT OF APPEAL

RESPONDENT'S BRIEF ON THE MERITS

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

KENNETH WITTS
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COUNSEL FOR
RESPONDENT

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STATEMENT OF THE CASE AND FACTS

Respondent accepts the facts as set out in Petitioner's brief on the merits.

SUMMARY OF THE ARGUMENT

A defendant is entitled to time served on probation when he receives another probationary term following a violation. The alternative to this is to allow a defendant to spend a limitless period of time on probation for even third degree felonies. There is no conflict between District Court's on this issue. All decisions have upheld respondent's position.

POINT

THE SENTENCE IMPOSED BY THE CIRCUIT COURT WAS ILLEGAL, AND THE DISTRICT COURT WAS CORRECT IN REVERSING THE SENTENCE.

The issue in this case is whether a defendant who violates his probation is entitled to credit for the time he served on probation when a court imposes another term of probation following the violation. There is no conflict between District Courts on this issue, with all recent decisions holding that a defendant is entitled to credit, Kolovrat v. State, 574 So.2d 294 (Fla. 5th.DCA 1991), Ogden v. State, 605 So.2d 155 (Fla. 5th.DCA 1992), Summers v. State, 625 So.2d 876 (Fla. 2d.DCA 1993) and the instant case, Wardell v. State, 19 Fla. L. Weekly D257 (Fla. 5th.DCA Feb. 4, 1994). The only case which went in Petitioner's favor was Smith v. State, 463 So.2d 494 (Fla. 2d.DCA 1985), but Smith was reversed in Summers.

The basis for these decisions is that, without a statutory maximum, a defendant could be on probation forever for a third degree felony. A defendant could serve four and one half years on probation, violate, and be sentenced to another five years, **ad infinitum**. This could, of course, result from minor technical violations as well as the commission of new crimes. The idea of spending fifteen or twenty years on probation for a relatively minor crime is absurd.

Since petitioner has no cases supporting its position, it relies on analogy and generalities. Petitioner first points out

that, according to Villery v. Florida Parole & Probation Comm'n, 396 So.2d 1107 (Fla. 1980), probation is not a sentence. Technically this is true, though the question of exactly what probation is remains unanswered. In any event, statutory maximums do apply to probation, and have since at least the decision in Watts v. State, 328 So.2d 223 (Fla. 2d.DCA 1976).

Next, the State relies on Ricketson v. State, 558 So.2d 119 (Fla. 5th.DCA 1990). In Ricketson, the defendant was sentenced to five years incarceration after serving more than five years probation for a third degree felony. The question was a jurisdictional one, and the District Court affirmed the sentence. Respondent would point out that Ricketson is analogous to Ramey v. State, 546 So.2d 1156 (Fla. 5th.DCA 1989). The court in Ramey held that when incarceration is imposed following revocation of probation, credit for the time spent on probation need not be given. This distinction is recognized in Ogden v. State, 605 So.2d 155 (Fla. 5th.DCA 1992).

This leads to the State's next argument, which seems to express concern for defendants. The State argues that it is illogical to allow prison to be imposed without credit for time served, while requiring credit to be given when probation is imposed subsequent to a violation. The difference is that, disregarding habitual offenders and the most recent sentencing guidelines, a defendant could not receive more than a total office years in prison for a third degree felony, no matter when the five years started to run. If one follows the State's

argument, a defendant could be on probation forever for the same crime. What is being dealt with in this appeal is not the comparative severity of sanctions, but only the period of time for which a sanction may be imposed. Some might consider five years in prison a more sever sanction than an indefinite period of probation, but at least it is a finite punishment.

Every court that has considered this issue has recognized the absurdity of subjecting a defendant to an infinite period of punishment for a crime with a clear statutory maximum sentence. Respondent urges this Court to do the same, and affirm the decision of the Fifth District Court.

CONCLUSION

BASED UPON the argument and authorities expressed herein, Respondent respectfully requests that this Honorable Court affirm the decision of the Fifth District Court of Appeal in this case.

Respectfully submitted,

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

Kenneth Witts

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COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served upon the Honorable Robert E. Butterworth, Attorney General, 444 Seabreeze Boulevard, Fifth Floor, Daytona Beach, Florida 32118, in his basket at the Fifth District Court of Appeal; and mailed to Mark Thomas Wardell, 14 Cary Street, St. Augustine, Florida 32084, on this 25th day of April, 1994.

Kenneth Witts

KENNETH WITTS
ASSISTANT PUBLIC DEFENDER

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,	)	
	)	
Petitioner,	)	
	)	
vs.	)	S.CT. CASE NO. 83,280
	)	
MARK THOMAS WARDELL,	)	DCA CASE NO. 93-143
	)	
Respondent.	)	
	)	

A P P E N D I X

of habeas corpus for belated appeal is granted and the petitioner is directed to file a notice of appeal in the circuit court within 30 days.

PETITION FOR WRIT OF HABEAS CORPUS FOR BELATED APPEAL GRANTED. (HARRIS, C.J., COBB and GOSHORN, JJ., concur.)

* * *

Criminal law—Sentencing—Probation revocation—Credit for time served—Error to fail to award credit for time served upon sentencing for violation of probation

WARREN SIMS, Appellant, v. STATE OF FLORIDA, Appellee. 5th District. Case No. 93-945. Opinion filed February 4, 1994. Appeal from the Circuit Court for Lake County, Jerry T. Lockett, Judge. James B. Gibson, Public Defender and Susan A. Fagan, Assistant Public Defender, Daytona Beach, for Appellant. Robert A. Butterworth, Attorney General, Tallahassee, and Carmen F. Corrente, Assistant Attorney General, Daytona Beach, for Appellee.

(PER CURIAM.) Sims appeals the sentence imposed following his violation of probation. We find no merit in his various points on appeal except his contention that the trial court failed to award him credit for time served. In that regard, the State concedes error.

REVERSED and REMANDED. (HARRIS, C.J., GOSHORN and THOMPSON, JJ., concur.)

* * *

Criminal law—Judgment—Trial court had inherent power to correct clerical error to reflect that defendant was originally convicted of second-degree felony of burglary of dwelling as opposed to third-degree felony of resisting officer with violence—Sentencing—Probation revocation—Error to impose additional five years' probation for resisting arrest with violence, and burglary of a structure and grand theft following finding of probation violation where total probationary term for each offense exceeds five years—Question certified whether trial court must, upon revocation of probation, credit previous time served on probation to any newly imposed term of community control and probation so that the total period of community control and probation does not exceed statutory maximum for single offense

MARK THOMAS WARDELL, Appellant, v. STATE OF FLORIDA, Appellee. 5th District. Case No. 93-143. Opinion filed February 4, 1994. Appeal from the Circuit Court for St. Johns County, Peggy E. Ready, Acting Circuit Judge. James B. Gibson, Public Defender, and Kenneth Witts, Assistant Public Defender, Daytona Beach, for Appellant. Robert A. Butterworth, Attorney General, Tallahassee, and Bonnie Jean Parrish, Assistant Attorney General, Daytona Beach, for Appellee.

(PER CURIAM.) We affirm Mark Thomas Wardell's judgments and sentences in case number 91-1417 below for violation of probation, and we specifically hold that the trial court had the inherent power to correct a clerical error to reflect that Wardell was originally convicted of the second-degree felony of burglary of a dwelling as opposed to the third-degree felony of resisting an officer with violence. *See Drumwright v. State,* 572 So. 2d 1029 (Fla. 5th DCA 1991). *See also Barriner v. State,* 19 Fla. L. Weekly D33 (Fla. 5th DCA Dec. 23, 1993).

However, we must vacate the trial court's order which placed Wardell on probation for an additional five years for the third-degree felonies of resisting arrest with violence (case number 91-1204) and burglary of a structure and grand theft (case number 91-1602) following a finding of violation of probation because the total probationary term imposed for each of these offenses exceeds five years. *See Ogden v. State,* 605 So. 2d 155 (Fla. 5th DCA 1992) (trial court, following a revocation of probation, cannot extend defendant's total period of probation beyond the statutory maximum of five years for a third-degree felony). *Accord Summers v. State,* 625 So. 2d 876 (Fla. 2d DCA 1993); *Moore v. State,* 623 So. 2d 795 (Fla. 1st DCA 1993); *Kolovrat v. State,* 574 So. 2d 294 (Fla. 5th DCA 1991). We remand case numbers 91-1204 and 91-1602 below for resentencing consistent with *Ogden* and *Kolovrat.* Because we view this issue to be a matter of great public importance, however, we certify this issue, as the second district did in *Summers*:

MUST A TRIAL COURT, UPON REVOCATION OF PROBATION, CREDIT PREVIOUS TIME SERVED ON PROBATION TO ANY NEWLY IMPOSED TERM OF COMMUNITY CONTROL AND PROBATION SO THAT THE TOTAL PERIOD OF COMMUNITY CONTROL AND PROBATION DOES NOT EXCEED THE STATUTORY MAXIMUM FOR A SINGLE OFFENSE?

AFFIRMED in part; REVERSED in part; REMANDED. (DAUKSCH, COBB and DIAMANTIS, JJ., concur.)

* * *

Dissolution of marriage—Equitable distribution—Dissolution judgment reversed where trial court failed to comply with equitable distribution statute

PHILLIP JAMES FRANZONI, husband, Appellant, v. KAY McKINNON FRANZONI, wife, Appellee. 5th District. Case No. 93-540. Opinion filed February 4, 1994. Appeal from the Circuit Court for St. Johns County, Peggy E. Ready, Acting Circuit Judge. David B. Ferebee of Willis, Bliss & Ferebee, Jacksonville, for Appellant. Kurt Andrew Simpson of Simpson, Copeland & Anderson, Jacksonville, for Appellee.

(DAUKSCH, J.) This is an appeal from a judgment in a marital dissolution case. Because the trial court failed to comply with the mandates of section 61.075(1), Florida Statutes (1993), the judgment is reversed, except as to the dissolution of the marital bonds, and remanded for a hearing and judgment on all property issues. *Robertson v. Robertson,* 593 So. 2d 491 (Fla. 1991); *Knecht v. Knecht,* 18 Fla. L. Weekly D2424 (Fla. 3d DCA Nov. 16, 1993); *Nash v. Nash,* 624 So. 2d 370 (Fla. 3d DCA 1993).

AFFIRMED in part; REVERSED in part; REMANDED. (COBB, J., concurs. GRIFFIN, J., concurs in part; dissents in part with opinion.)

(GRIFFIN, J., concurring in part; dissenting in part.) I agree that the lower court failed to comply with the requirements of section 61.075(1), Florida Statutes (1993) by failing to identify various items of personalty as marital or non-marital property and by failing to make the requisite findings. The findings on the condominium appear adequate, however. I see no basis for requiring a new hearing.

* * *

Torts—Medical malpractice—Limitation of actions—When parties to medical malpractice action agree to extension of presuit phase, a notice "rejecting the claim" is same as a "notice of termination of negotiations" under statute providing that claimant has 60 days following receipt of notice of termination or the remainder of period of statute of limitations, whichever is greater, within which to file suit—Where parties agreed to extension of presuit phase, 60-day period for filing suit commenced when plaintiff received notice rejecting claim rather than when period of extended presuit phase expired

JAMES MASON and MARIAN MASON, etc., Appellants, v. DR. CHARLES D. BISOGNO, D.O., et al., Appellees. 5th District. Case No. 92-2870. Opinion filed February 4, 1994. Appeal from the Circuit Court for Osceola County, R. James Stroker, Judge. Mark V. Morsch of Parrish, Bailey and Morsch, P.A., Orlando, for Appellants. Clay H. Coward and Craig S. Foels of Hannah, Marsee, Beik & Voght, P.A., Orlando, for Appellee.

(THOMPSON, J.) James and Marian Mason appeal a final judgment entered in favor of Dr. Charles D. Bisogno in their medical malpractice suit. The trial judge granted Dr. Bisogno's motion for summary judgment based upon the expiration of the statute of limitations. The quagmire in this case is created by alleged conflict between sections 766.106(3) and 766.106(4), Florida Statutes (1991), and Florida Rule of Civil Procedure 1.650(d)(3). We find no conflict and we affirm the trial court.

FACTS

The appellants are husband and wife. The appellee in this action is Dr. Charles Bisogno who allegedly negligently per-