IN THE

SUPREME COURT OF FLORIDA

STATE OF FLORIDA, Petitioner, vs. DARRELL ROUNDTREE, Respondent.	)	CASE NO. 83,839

RESPONDENT'S BRIEF ON THE MERITS

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TABLE OF CONTENTS

CONTENTS PAGE

AUTHORITIES CITED

CASES CITED — PAGE

FLORIDA STATUTES

SUMMARY OF THE ARGUMENT

A term of probation or community control cannot exceed the statutory maximum jail or prison sentence unless expressly provided by statute. Thus, when probation is revoked and a new term of probation is imposed, the new term of probation, when combined with the number of months or years of probation that the defendant has already successfully completed, cannot exceed the statutory maximum. In other words, a trial judge may impose a new term of probation which equals the statutory maximum, but the trial judge must credit or reduce this new term by the the number of months or years of probation the defendant has successfully completed. To hold otherwise would sanction probationary sentences in excess of the statutory maximums, indeed, would sanction ad infinitum probationary sentences. There is simply no statutory authorization for such a holding. Thus, this Court must answer the certified question in the affirmative.

ARGUMENT

ISSUE ON APPEAL

MUST A TRIAL COURT, UPON REVOCATION OF PROBATION (AND/OR COMMUNITY CONTROL), CREDIT PRIOR TIME SERVED ON PROBATION (AND/OR COMMUNITY CONTROL) TOWARD A NEWLY IMPOSED PROBATIONARY TERM SO THAT THE TOTAL PROBATIONARY TERM SERVED AND TO BE SERVED DOES NOT EXCEED THE MAXIMUM SENTENCE ALLOWED BY LAW?

Petitioner asks this Court to hold that a trial court may sentence a defendant to a total term of probation or community control which exceeds the statutory maximum jail or prison term upon revocation of that probation or community control.[1] In the absence of clear legislative authorization for such a sentence, this Court must hold to the contrary and answer the certified question in the affirmative.

It is firmly established that a term of probation cannot exceed the statutory maximum jail or prison sentence unless expressly provided by statute. Watts v. State, 328 So. 2d 223 (Fla. 2d DCA 1976).[2] In addition, when the court imposes a split sentence, the combined period of incarceration and probation may not exceed the statutory maximum. State v. Holmes, 360 So. 2d 380 (Fla. 1978). Finally, if the probationary portion of a split sentence is

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[1] It should be noted that Petitioner (Appellee in the lower court) agreed that Respondent's probationary sentence must be reduced by the number of months that he successfully completed so that his total probationary sentence did not exceed the statutory maximum. See Roundtree v. State, 19 Fla. L. Weekly D1170 (Fla. 4th DCA May 25, 1994) ("The state acknowledges that Appellant is entitled to credit for the time previously spent on probation because the total time on probation, by combining the probation time served prior to the violation with the subsequent probationary term, exceeds the statutory maximum."). (See the attached appendix containing the argument portion of Petitioner's Answer Brief in the lower court.) The Fourth District Court of Appeal certified a question of great public importance *sua sponte*.

[2] In Watts the Court noted that § 948.04, Fla. Stat. (1973), specified that a term of probation could not extend more than two years beyond the maximum permissible sentence, but that after that provision was repealed, a court was "powerless to extend a period of probation beyond the maximum permissible sentence except as provided in that statute." Watts, 328 So. 2d at 223. See also Smith v. State, 484 So. 2d 581, 582 (Fla. 1986). Because this holding has never been disturbed by the legislature, approval of it by the legislature may be assumed. See White v. Johnson, 59 So. 2d 532, 533 (Fla. 1959) (failure of the legislature to amend a statute that has been construed by the judiciary in a particular manner may amount to a legislative acceptance or approval of the construction).

subsequently revoked, a trial judge may impose any prison or jail sentence which she might have originally imposed *but minus the jail or prison time previously served as a part of the sentence.*[3] Holmes, supra, 360 So. 2d at 383. This last requirement is necessary to keep the total jail or prison sentence from exceeding the statutory maximum. See Jones v. State, 633 So. 2d 482, 483 (Fla. 1st DCA 1994).

Petitioner asserts that probation or community control may exceed the statutory maximum upon revocation based on the following language in § 948.06(1), Fla. Stat. (1993):

> If such 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 has previously been adjudged guilty, *and impose any sentence which it might have originally imposed before placing the probationer or offender on probation or community control.* [Emphasis added.]

Petitioner wants this Court to intrepret "impose any sentence" to mean "impose any sentence without regard to the statutory maximums." However, this Court has obviously decided that the legislature intended this language to mean "impose any sentence within the statutory maximums," otherwise this Court would not require trial courts to credit jail or prison time previously served upon revocation in order to keep the total sentence within the statutory maximum. Holmes, supra, 360 So. 2d at 383. Petitioner's interpretation of the statute dispenses with this last requirement (a trial court can impose "any" sentence, Petitioner asserts) and would authorize prison and jail sentences beyond the statutory maximum. Petitioner would have to agree that that is not what the legislature intended. Yet there is as much support in § 948.06(1) for exceeding the statutory maximum prison or jail sentences upon revocation (by not requiring that credit be given for previous time served) as there is for exceeding the statutory maximum probationary or community control sentences (by not requiring that credit be given

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[3] Time spent on probation may not be credited towards this new prison or jail term. Holmes; § 948.06(2), Fla. Stat. (1993). Petitioner (confusingly) asserts that this rule supports its argument. Petitioner's Brief at p. 5-11. However, this rule has nothing to do with the issue in the instant case; the rule simply recognizes that being on probation or community control is not the equivalent of being in jail, and therefore a defendant does not get jail credit for it. See Summers v. State, 625 So. 2d 876, 878 (Fla. 5th DCA 1993), rev. pending, Case No. 82,632.

for those months of probation or community the defendant successfully completed)--i.e., there is little or no support for either proposition.

If there is any doubt as to the construction of this statute, that doubt must, of course, be resolved in favor of the criminally accused. § 775.021(1), Fla. Stat. (1993), provides:

> The provisions of this code and offenses defined by other statutes shall be strictly construed; when the language is susceptible of differing constructions, it shall be construed most favorably to the accused.

Because the legislature has not clearly signalled its intent to authorize a probation or community control sentence which exceeds the statutory maximum, this Court must answer the certified question in the affirmative.

CONCLUSION

Based on the foregoing Argument and the authorities cited therein, Respondent respectfully requests this Honorable Court to answer the certified question in the affirmative and affirm the decision of the Fourth District Court of Appeal.

Respectfully submitted,

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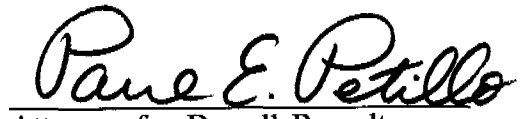
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to CAROL COBOURN ASBURY, Assistant Attorney General, 1655 Palm Beach Lakes Blvd, Suite 300, West Palm Beach, Florida 33401 by courier this 29th day of July, 1994.



Attorney for Darrell Roundtree

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APPENDIX

ARGUMENT

POINT ON APPEAL

THE TRIAL COURT ERRED IN SENTENCING APPELLANT IN CASE NO. 91-5608 AND 91-5507 TO A TERM OF YEARS BEYOND THE STATUTORY MAXIMUM

On June 18, 1991, Appellant plead guilty to three grand thefts in three separate cases. R 114. In each case Appellant was declared a habitual felony offender and was placed on three years of probation. R 114,46-47,79,120. The Statutory maximum for the third degree felonies as a habitual offender is ten years. The Appellant repeatedly violated his probation and was repeatedly found guilty. Finally, after he was found guilty on the third violation of probation, Appellant was sentenced in case number 91-5608 to five years state prison followed by five years probation and in case number 91-5507 to ten years probation. R 28,65-66,99-100,168-169. Credit was given for the time spent in county jail pending re-sentencing on the violation of probation and/or community control, however, no credit was given for the few months he spent on probation or community control without violating community control. Thus, Appellant's sentence is beyond the statutory maximum of ten years.

Appellant is entitled to credit for the few months he spent on probation without violating. Ogden v. State, 605 So. 2d 155 (Fla. 5th DCA 1992); Kolovrat v. State, 574 So.

2d 294 (Fla. 5th DCA 1991). Thus, Appellee concedes that this case must be remanded in order give Appellant credit for those months on probation he completed prior to each violation.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy the Appendix has been furnished by courier to CAROL COBOURN ASBURY, Assistant Attorney General, 1655 Palm Beach Lakes Blvd., Third Floor, West Palm Beach, Florida 33401 this 29th day of JULY, 1994.

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