IN THE SUPREME COURT OF FLORIDA

TERRY WAYNE EANES,

Petitioner,

v. CASE NO. 84,787

STATE OF FLORIDA,

Respondent.

_____/

PETITIONER'S BRIEF ON THE MERITS

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PETITIONER'S BRIEF ON THE MERITS

I PRELIMINARY STATEMENT

Petitioner was the appellant below and will be referred to as petitioner in this brief. The state will be referred to as respondent or the state.

The record on appeal consists of two volumes. Volume I consists of the information, motions, other pleadings, and orders filed in the lower court. References to this volume will be designated as "R" followed by the appropriate page number, in parentheses. Volume II contains the transcript of the violation of probation hearing held before Circuit Judge Clinton Foster, of Bay County. Citations to volume II will be referred to as "T" followed by the appropriate page number, in parentheses.

The First District Court of Appeal, in its opinion in Eanes v. State, 19 Fla. L. Weekly D2254 (Fla. 1st DCA October 17, 1994), ruled against petitioner and affirmed the lower court's revocation of community control and sentences. Upon

petitioner's motion for certification of conflict, the First District certified that its decision in this case was in conflict with decisions from other district courts in Florida. Eanes v. State, 19 Fla. L. Weekly D2427 (Fla. 1st DCA November 18, 1994).

II STATEMENT OF THE CASE

This appeal represents the consolidation of two cases involving violations of probation and community control in the lower court. The two cases arose in 1986 and 1987. Appellant was resentenced several times to probation and community control. Finally, in 1993 he was sentenced to four and a half years in prison. This was after he had completed more than five years on probation and community control on each of the two original charges. Since the original charges were third degree felonies, the statutory maximum sentence was five years.

The First District Court of Appeal ruled against petitioner and found that probation and community control should not be treated alike for purposes of calculating length of sentence. Eanes v. State, 19 Fla. L. Weekly D2254 (Fla. 1st DCA October 17, 1994). The matter is now before this Court on the basis of the First District's certification of conflict. Eanes v. State, 19 Fla. L. Weekly D2427 (Fla. 1st DCA November 18, 1994).

III STATEMENT OF THE FACTS

A careful reading of Volumes I and II reveals that this record is poorly organized. Interpreting the record is made more difficult by the fact that several nunc pro tunc orders were signed by various lower court judges. Further, all of the participants in the lower court at various times in the past referred to probation and community control interchangeably.

On September 10, 1986, petitioner pled guilty to resisting arrest with violence, a third degree felony, in Bay County Circuit Court case number 86-548. (R - 23-24) His original scoresheet shows that he scored a total of 74 points including 73 points for the crime charged and one point for a prior misdemeanor. His guidelines sentence was any nonstate prison sanction, a range of 73 - 112 points. (R - 25) Appellant was placed on three years of probation on October 16, 1986. (R - 28)

The lower court found him to be in violation of probation on April 5, 1988, after he pled nolo contendere to possession of cocaine, a third degree felony, on February 4, 1988, in Bay County Circuit Court case number 87-2359. (R - 149 - 150) On March 17, 1988, he was adjudicated guilty and sentenced to an additional five years probation, to run concurrently with his sentence in case number 87-2359, for which he received five years of probation. The first 364 days of his new probation and sentence were to be spent in jail with 110 days credit for time served. (R - 43-44, 153 - 156)

In February of 1990, petitioner's probation officer attempted to have his probation revoked in both cases for further violations of law, for which a no-information may have been filed. (R - 46-49, 53, 158 - 161) Whether petitioner was found to be in violation is not clear from the record since there is no order or judgment. The probation officer's next violation report states that on August 28, 1990, the petitioner pled guilty to the 1990 violation whereupon adjudication of guilt was withheld, petitioner's probation was reinstated, and he was sentenced to time served. (R - 59) The record contains court minutes which do not bear the judge's signature, but no order to this effect. (R - 163)

On February 11, 1992, the judge found petitioner to be in violation and placed him on community control for a two year period, in both cases. (R - 75-76) This judgment merely refers to case number 86-548; however, a second judgment of guilt and sentence was signed by the judge on February 28, 1992, nunc pro tunc February 11, 1992, which deals with both case numbers 86-548 and 87-2359. Later in the record there is a judgment pertaining to case number 87-2359. The court sentenced him to two years of community control on each case to run concurrently. (R - 78-79, 173 - 174) It should be noted that the state prepared a new sentencing guidelines scoresheet, instead of relying on the original, which listed the first case as the primary offense and the second case as an additional offense at conviction. The state attached 24 points for victim injury. No such points were included in the original

scoresheet for the case to which victim injury might have applied, case number 86-548. (R - 25, 77) This artificially boosted the total points.

Finally, on June 8, 1993, he was found to be in violation of his community control in case numbers 86-548 and 87-2359. (R - 92-93, 181 - 182) The state's guidelines scoresheet for this matter still listed 24 points for victim injury and further added an additional four prior offenses and eight points for same category priors which had never before appeared on any of petitioner's scoresheets. These "priors" probably are crimes which are referred to in the record and which occurred after both of the cases were originally brought. (R - 85, 184) In fact, the "priors" may be the charges which the probation officer attempted to use as violations of probation in February of 1990. The transcript of petitioner's final violation hearing indicates that the judge sentenced him to jail for the June 8, 1993, violation but then changed his mind and reinstated petitioner's probation, or perhaps community control. (T - 6)

Orders revoking petitioner's community control in both cases appear in the record, dated August 10, 1993, and December 10, 1993. There is no evidence that these orders referred to two separate violation proceedings. (R - 94, 114) He was sentenced on November 16, 1993, to four and a half year prison terms on each of the cases, to be served concurrently. He was given credit for 450 days already served. (R - 104 - 105, T - 30)

During the violation hearing, the lower court did not state the specific conditions of probation or community control which had been violated. (T - 26) Further, the court did not prepare a written order containing its findings.

The defense filed its notice of appeal and moved to consolidate the two cases for appeal on December 15, 1993. (R -192, 198) The notice of appeal was filed in a timely manner and the lower court granted the motion to consolidate. (R - 201)

The First District Court of Appeal issued its opinion on October 17, 1994. Eanes v. State, 19 Fla. L. Weekly D2254 (Fla. 1st DCA October 17, 1994). The Court believed that the imposition of the community control sentence in 1992, upon revocation of probation was proper because the probation officer had filed the affidavits of violation of probation before the end of the probationary term. Acknowledging this Court's decision in State v. Summers, 19 Fla. L. Weekly S449 (Fla. September 22, 1994), it admitted that had a new probationary term been imposed in 1992, appellant would have been entitled to credit for previous time spent on probation. The First District, however, decided that probation, jail, and community control were not the functional equivalents of each other. As a result, the appellant was not entitled to receive credit for time served on probation, or community control, and the trial court's jurisdiction had not lapsed prior to the filing of the affidavit of violation of community control which

resulted in his current prison sentence. The Court admitted that its decision was anomalous to Summers.

The petitioner moved the First District to certify that a conflict existed between its opinion and those of other districts. The court did this, citing to Roundtree v. State, 637 So. 2d 325 (Fla. 4th DCA 1994); Jost v. State, 631 So. 2d 1131 (Fla. 5th DCA 1994); and Straughn v. State, 636 So. 2d 845 (Fla. 5th DCA 1994). Eanes v. State, 19 Fla. L. Weekly D2427 (Fla. 1st DCA November 18, 1994).

The petitioner filed a notice to invoke the discretionary jurisdiction of this Court on November 28, 1994.

IV SUMMARY OF THE ARGUMENT

Appellant was unjustly retained on probation and community control and sentenced to prison after the statutory maximum sentence for third degree felonies expired in both the cases involved in this appeal. As to his 1986 case, the five year term ended on October 15, 1991. The five year term for his 1987 case ended on March 17, 1993. The affidavit of violation of probation for both cases involved in this appeal was filed on September 30, 1993, well after those dates. (R - 96) As a result of these miscarriages of justice, he should be immediately released from prison, or state supervision, and from the lower court's jurisdiction.

V ARGUMENT

ISSUE: THE LOWER COURT IMPROPERLY RETAINED JURISDICTION OVER THE APPELLANT LONG AFTER HE COMPLETED THE STATUTORY MAXIMUM SENTENCES FOR THE CRIMES HE WAS CHARGED WITH COMMITTING AND THE SENTENCES IMPOSED AFTER THE FIVE YEAR PERIODS EXPIRED WERE CONTRARY TO FLORIDA LAW.

On October 16, 1986, petitioner was sentenced to probation in case number 86-548. Any sentence he received at that time, and thereafter for violation of probation and community control, was limited by the maximum sentence allowed for a third degree felony by Section 775.082, 1985 Florida Statutes. This five year maximum term ended on October 16, 1991. Despite this, he was continued on probation or community control for two more years, during which time he was found to be in violation of the terms and conditions of his sentence a total of three times. The dates on which he was found to be in violation and resentenced are February 11, 1992; June 8, 1993; and November 16, 1993. At his November 16, 1993, sentencing, which occurred over seven years after his original sentencing, he received a prison term of four and a half years with credit for time served. If he serves the full term, his punishment for the crime of resisting arrest with violence will total some ten or more years.

On March 17, 1988, petitioner was sentenced to probation in case number 87-2359 involving a possession of cocaine charge. This was also a third degree felony and therefore the maximum statutorily allowed sentence was five years. For this crime the five year maximum expired on March 17, 1993. Despite

this he was continued on probation or community control. He was found to be in violation on June 8, 1993, and finally, he was found to be in violation on November 16, 1993, when he was sentenced to four and a half years in prison with credit for time served. If he serves the full term for this crime, his punishment for this third degree felony with a maximum penalty of five years will total approximately nine and a half years.

The trial court was completely without jurisdiction or authority to continue finding petitioner in violation of probation or community control and to continue sentencing him after October 16, 1991, in the 1986 case, and March 17, 1992, in the 1987 case. The affidavit of violation of probation for both cases involved in this appeal was filed on September 30, 1993, well after those dates. (R - 96)

While it may be repugnant to the lower court, it is a fact that it has imposed the prison sentences in these cases too late for petitioner to be required to serve them. For this court to do otherwise than to reverse petitioner's convictions for violation of probation or community control and vacate his sentences, would be to allow a absurdity to continue.

The Florida Legislature never intended to allow a court to continue punishing a defendant for a third degree felony years and years after the statutory sentence has run. The Legislature would not have created the maximum sentence had it intended otherwise. Similarly, the sentencing guidelines provide that where a defendant is charged with a single offense, if the guidelines sentence exceeds the statutory maximum, the

statutory provision will be applied. Florida Rule of Criminal Procedure 3.701(d)(10). This rule and the statutory maximum were in effect in 1986.

This Court has held that a defendant must be given credit for time previously spent on probation when a new term of probation is imposed upon him, after violation of probation, so that the total amount of time spent on probation does not exceed the statutory maximum penalty. State v. Summers, 642 So. 2d 742 (Fla. 1994); Wardell v. State, 642 So. 745 (Fla. 1994).

The petitioner's case presents a more complicated situation than those presented in the two above cited cases. Here, petitioner spent time, a great deal of time, on both probation and community control before being sentenced to prison. It is his position that probation and community control should both be credited toward determining when the statutory maximum sentence has been completed.

This position is supported by the Fourth and Fifth District Courts of Appeal and it is with the decisions from those courts that the First District has acknowledged conflict. The Court specifically mentioned three decisions in its certification of conflict.

First, the Court cited Roundtree v. State, 637 So. 2d 325 (Fla. 4th DCA 1994). In that case the defendant was sentenced to a probationary term which followed his original probationary term. The Fourth District did say, however, that it could see "no reason for not applying the same reasoning when combining

time spent on community control with a subsequent probation." Id. at 326. The court certified the following question:

> 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?

Roundtree at p. 326.

This Court approved of the Fourth District decision, saying that this Court had recently answered a similar question affirmatively in Summers and that the district court decision in Roundtree was consistent with Summers. State v. Roundtree, 19 Fla. L. Weekly S627 (Fla. November 23, 1994).

Second, the First District referred to conflict with Jost v. State, 631 So. 2d 1131 (Fla. 5th DCA 1994). There, as in Roundtree, the court granted relief to the defendant, but certified the following question to this Court:

> 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?

Id. at p. 1132. In Jost, the state conceded that the defendant's sentence was illegal, as a result neither party in the case pursued a ruling from this Court.

Third, the First District cited to Straughan v. State, 636 So. 2d 845 (Fla. 5th DCA 1994), wherein the Fifth District dealt with a situation like petitioner's where the defendant

received both probation and community control sentences, the total of which exceeded the statutorily provided maximum sentence. The court held that the two forms of punishment, taken together, cannot exceed a statutory sentence maximum.

Unlike the petitioner's situation, the defendant there was still within the statutory maximum sentence of five years. He appealed because the trial court had imposed a sentence of community control and probation, upon a violation of probation, which extended beyond the five year period. Although it certified the same question as in Jost, the district court went ahead and vacated the defendant's sentence and remanded the case. Apparently the state and the defense were satisfied with the relief the district court granted to the defendant because neither party pursued a ruling from this Court.

It is the petitioner's position that the First District's decision in this case also conflicts with Ogden v. State, 605 So. 2d 155 (Fla. 5th DCA 1992). There the court found that community control, while more severe than probation, was analogous to probation "in that a defendant is not sentenced to probation or community control, but placed on probation or community control in lieu of being sentenced [to prison]." Id. at p. 159. The court held that the trial court erred when it placed the defendant on probationary and community control terms which exceeded the statutorily mandated maximum sentence.

A ruling from this Court which does not grant relief to the petitioner from his excessive sentences would create an absurd result, as well as a precedent which would foster

further miscarriages of justice. If probation cannot be extended longer than the legislature intended then community control should not be so extended. Community control is certainly not as restrictive as prison. It allows a defendant to remain in his community or even his home. If he is placed in a residential placement outside of his home, the placement is considered noninstitutional. Section 948.001(2), Florida Statutes. Like probation, he stays within his community and is carefully supervised. Community control is not sufficiently different from probation to warrant the denial of credit for time served on one toward a sentence of the other.

The Second District Court of Appeal has addressed a case with the precise facts as in petitioner's situation in the 1986 case, case number 86-548. In Teasley v. State, 610 So. 2d 26 (Fla. 2d D.C.A. 1992), rev. den., 618 So. 2d 1370 (Fla. 1993), the defendant was originally placed on probation. After two violations, he was placed on community control. Upon violation of community control, he was sentenced to five years in prison. The Second District Court of Appeal pointed out that the statutory maximum sentence was completed during the defendant's second term of probation. The court said, "A trial court may not extend probation beyond the statutory maximum. . . . [T]he trial court in the instant case did not impose the five-year sentence until after the probation should have been terminated. Thus, we vacate the five-year prison sentence in case number 84-4947." Id. at 27.

As in Teasley and the other cases cited above, petitioner's sentences must be vacated since the lower court did not have the power to find he had violated community control or probation after October 16, 1991, in case number 86-548, and after March 17, 1992, in case number 87-2359.

The First District may have reached the same conclusion in Moore v. State, 623 So. 2d 795 (Fla. 1st D.C.A. 1993). There, the defendant was placed on five years of probation. After he was found to be in violation of that probation, the trial court sentenced him to a new five year term of probation with a condition that the first year be served on community control. The result was a combined term of probation and community control which exceeded the statutory maximum. The opinion unequivocally stated that a trial court cannot extend probation beyond the statutory maximum sentence. The Court specifically cited to Ogden for the proposition that to hold otherwise would allow courts to extend probation and community control ad infinitum beyond a statutorily mandated maximum each time there was a violation.

This Court's decision in Hall v. State, 641 So. 2d 403 (Fla. 1994), is pertinent to the petitioner's situation, where affidavits of violation of probation and community control were filed after the five year statutory maximum term had been served. In Hall an affidavit of violation of probation was filed before the probationary term expired. After the term ran, an amended affidavit alleging new charges was filed. This Court found that the trial court could not consider the new

allegations in the amended affidavit because they were untimely. This holding clearly means that a probationary period is not tolled by the filing of an affidavit of violation. Logically, this applies to community control terms as well, under holdings like that in Evans v. State, 19 Fla. L. Weekly D1397 (Fla. 1st DCA June 29, 1994)(affidavit of violation filed after community control ended).

In the lower appellate court the state assumed that petitioner absconded from March 23, 1991, to December 26, 1991. There is no evidence in the record that the probation officer's allegation that he absconded was found by the court, or admitted by the petitioner, to be true. The probation officer's affidavit of violation merely states that it is "believed that the aforesaid has absconded from supervision". (R - 56) In fact, a violation report form, dated after the original affidavit of violation, lists five violations of which none alleges that he absconded. Violation three merely states that he changed residence without permission. The next page of the document again merely states that it is "believed that subject has absconded from supervision". (R - 67-69) The judge's February 28, 1992, judgment and sentence order does not list any findings of specific violations. (R - 78-79)

Even if petitioner was unavailable for that nine month period, the five year statutory maximum in the first case, resisting arrest, would still have ended well before the violation proceedings which are the subject of this appeal began or were concluded.

The legislature never intended the result achieved by the lower court and the First District Court of Appeal in this case. Probation and community control, whether taken together or alone, were not intended to run on ad infinitum. Ogden, at 158.

If the decision in this case is upheld by this Court, the maximum sentence for a third degree felony would no longer be five years. Rather, the maximum sentence would be just short of 12 years. A defendant could serve almost five years of probation, almost two years of community control, and finally five years of prison. The First District erred when it ruled in this matter that such a result was appropriate. Rather, the holdings of the other districts, cited to in this brief, show that combined sentences of probation and community control which result in terms exceeding the statutory maximum allowed by the legislature are illegal in Florida.

The First District has conceded that its decision is in conflict with those of other districts. It is now up to Florida's Supreme Court to issue a just ruling granting relief to defendants who, like the petitioner, have served far longer sentences than those they could ever have expected or were ever notified of. Such a holding might be repugnant to some lower courts and no doubt there will be complaints that judges have lost the power to punish defendants who fail to live up to the requirements of probation or community control. In reality these complaints will not be true. A trial court will always

have the option of sentencing to prison a defendant who violates probation or community control.

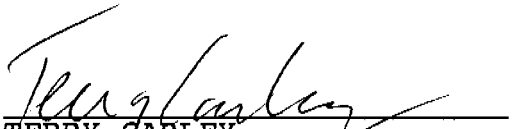
All a court must do, with the help of the state or the probation or community control officer, is keep track of the amount of time already spent on probation or community control so that the statutory maximum sentence does not expire before such a sentence can be imposed. Frankly, this is all that the trial court, the state, and the community control officer needed to do in this case.

CONCLUSION

Based upon the foregoing arguments and authorities, the petitioner respectfully requests that his convictions and sentences be vacated.

Respectfully submitted,

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Bill Bakstran, Assistant Attorney General, by delivery to The Capitol, Plaza Level, Tallahassee, Florida, and a copy has been mailed to petitioner, on this 2nd day of February, 1995.

TERRY CARLEY