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IN THE SUPREME COURT OF FLORIDA

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TERRY WAYNE EANES,

Petitioner,

vs. Case No. 84,787

STATE OF FLORIDA,

Respondent.

RESPONDENT'S BRIEF ON MERITS

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PRELIMINARY STATEMENT

Petitioner, Terry Wayne Eanes, defendant/appellant below, will be referred to herein as "Eanes" or "the Petitioner." Respondent, the State of Florida, will be referred to herein as "the State." References to the record on appeal will be by use of the letter "R" followed by the appropriate page number(s) in parentheses. References to the transcript of proceedings will be by use of the letter "T" followed by the appropriate page number(s) in parentheses. References to the Petitioner's initial brief will be by use of the letters "IB" followed by the appropriate page number(s) in parentheses.

STATEMENT OF THE CASE

Except for the fifth sentence of the first paragraph, the State accepts the Petitioner's statement of the case. The State rejects the fifth sentence because, in it, the Petitioner assumes as given a point which the State would vehemently contest — it is the State's position that the Petitioner never completed his probation nor his community control before he was sentenced to prison.

STATEMENT OF THE FACTS

The State agrees with the first sentence of the Petitioner's statement of the facts in that the "record is poorly organized." (IB 4). To facilitate this Court's review of the record of the instant case, the pertinent facts are presented chronologically as follows:

DATES	CASE NO. 86-548	CASE NO. 87-2359
9/10/86	Eanes pleads guilty to resisting officer with violence (R 23-24)	
10/16/96	Trial court issues order (nunc pro tunc 10-8-86) withholding adjudication and placing Eanes on 3 years probation (R 28)	
12/8/87	VOP affidavit filed charging Eanes with possession of crack cocaine (R 34)	
1/11/88		Information filed charging Eanes with possession of crack cocaine which was basis for VOP in 86-548 (R 216)
3/17/88		Trial court places Eanes on 5 years probation with condition that first 364 days be served in jail with credit for 105 days (R 153-54)

DATES	CASE NO. 86-548	CASE NO. 87-2359
4/5/88	Eanes adjudicated guilty of resisting officer with violence & placed on 5 years probation (R 41-42)	
4/7/88	"Judgment of Guilt and Placing Defendant on Probation" filed (nunc pro tunc 4/5/88) making Eanes'probation concurrent to probation in 87-2359 (R 43)	
4/22/88	"Order of Revocation of Probation" filed (nunc protunc 4/5/88) (R 44)	
5/17/91	VOP affidavit filed alleging: Eanes failed to report or pay supervision costs in Feb., Mar. and April, 1991; changed residence without permission; failed to pay other costs (R 56) Arrest warrant filed (R 57)	VOP affidavit filed alleging same violationa as in 86-548 and also alleging that Eanes failed to perform public service work (R 166) Arrest warrant filed (R 167)
12/17/91	First Appearance form filed showing Eanes arrested on 12/26/91 (R 61)	Same first Appearance form filed in 86-548 applies to this case (R 61)
2/11/92	Upon Eanes' nolo plea trial court places him on 2 years community control (R 75-76)	
2/24/92		Trial court issues order (nunc pro tunc 2/11/92) revoking Eanes' probation (R 175)

DATES	CASE NO. 86-548	CASE NO. 87-2359
2/28/92	Trial court issues order (nunc pro tunc 2/11/92) placing Eanes on 2 years community control in "each case concurrent" (R 78)	Same order filed in 86-548 applies to this case (R 78)
4/13/93	VOCC affidavit filed alleging Eanes violated law by driving with suspended or revoked license and by failing to remain confined to approved residence (R 83)	Same VOCC affidavit filed in 86-548 applies to this case [typographical error at top of affidavit showing case number as 87-859 is repeated at top of arrest warrant, but text of affidavit & warrant show correct case number] (R 83-84)
5/18/93	Circuit court minutes filed showing Eanes pled nolo and admitted violations (R 89)	Same circuit court minutes filed in 86-548 also applies to this case (R 89)
6/8/93	Letter from Eanes' employer filed (R 90) Circuit court minutes filed showing community control reinstated (R 91)	Circuit court minutes filed in 86-548 also applied to this case (R 91, 180)
8/10/93	Trial court issues order (nunc pro tunc 6/8/93) (R 91) revoking Eanes' community control but indicating community control reinstated on 6/8/93 (R 94)	Same order filed in 86-548 applies to this case (R 94)
9/30/93	VOCC affidavit filed alleging Eanes failed to remain confined at approved residence and changing address without permission (R 96)	Same VOCC affidavit filed in 86-548 applies to this case (R 96)

DATES	CASE NO. 86-548	CASE NO. 87-2359
11/16/93	At conclusion of evidentiary hearing, trial court finds that Eanes violated his community control and sentences him to DOC for 4½ years with credit for 450 days (T 26, 30)	Same evidentiary hearing held in 86-548 applies to this case. (T 1)

SUMMARY OF THE ARGUMENT

When distilled, the complicated facts of this case can be simply summarized as follows: the Petitioner violated the law and was placed on probation; he violated his probation and was placed into community control; he violated his community control and was incarcerated.

The trial court had jurisdiction to appropriately punish the Petitioner at every stage of his punishment. Despite repeated opportunities to successfully complete first his probation and later his community control, the Petitioner persisted in his incorrigible behavior and continued to violate first the terms of his probation and then the conditions of his community control until finally he was incarcerated.

The State recognizes that the Petitioner should have been credited with the time he had already served on probation when the trial court revoked his original three-year probation and reimposed the probation for five years in Case No. 86-548. However, even if the Petitioner's five-year probation in that case had been adjusted to terminate in October 1991 (as the Petitioner argues), it would not have made any difference because the process to revoke his probation in both cases was set in motion with the filing of the affidavits in May 1991.

When the Petitioner was placed into community control, he was not entitled to credit for any of the time he had served on probation; likewise, when he was incarcerated, he was not entitled

to credit for any of the time he had served on either probation or community control. Consequently, the Petitioner's sentence does not exceed the statutory maximum.

ARGUMENT

ISSUE

WHETHER THE TRIAL COURT HAD JURISDICTION TO SENTENCE THE PETITIONER TO PRISON UPON THE PETITIONER'S VIOLATION OF COMMUNITY CONTROL, WHERE THE PETITIONER HAD BEEN PLACED INTO COMMUNITY CONTROL FOLLOWING HIS VIOLATION OF PROBATION. (Restated)

Introduction

The Petitioner argues that he was unjustly retained on probation and community control and that he was unjustly incarcerated long after the statutory maximum sentence had run for each of his crimes. The Petitioner's argument is based upon his theory that, because each of his offenses was a third-degree felony with a statutory maximum sentence of five years, the trial court lost jurisdiction exactly five years after it first placed him on probation for each offense. Because the Petitioner has failed to take into account the well established principle that the filing of an affidavit alleging a probation violation tolls the running of the probationary period, his argument must fail. As explained below, the trial court properly retained jurisdiction over the Petitioner.

Applicable Law

Upon revocation of probation or community control, a trial court may "impose any sentence which it might have originally imposed before placing the probationer or offender on probation or

into community control." §948.06(1), Fla. Stat. (1993).[1] If the probationer has already served part of his sentence in jail, the trial court must give him credit for time previously served, but not for the time spent on probation. §948.06(2), Fla. Stat. (1993); State v. Holmes, 360 So. 2d 380, 383 (Fla. 1978); Priest v. State, 603 So. 2d 141 (Fla. 2d DCA 1992). However, if the trial court decides to impose further probation, it must credit the probationer with previous time spent on probation. Summers v. State, 625 So. 2d 876, 879 (Fla. 2d DCA 1993), approved, State v. Summers, 642 So. 2d 742 (Fla. 1994). In other words, if upon revocation of probation, the trial court reinstates probation, "the combined periods of probation cannot exceed the maximum incarcerative period permitted by statute for the underlying offense." Moore v. State, 623 So. 2d 795, 797 (Fla. 1st DCA 1993). The same reasoning requires that upon revocation of community control, an offender must be allowed credit for that portion of community control he successfully completed prior to the violation. Lastinger v. State, 629 So. 2d 324 (Fla. 2d DCA 1993).

The foregoing does not mean that, when a trial court imposes community control upon revocation of probation, it must credit prior time served on probation against the newly imposed community control. Likewise, it does not mean that, when a trial court sentences an offender to prison upon revocation of community control, it must credit prior time served in community control

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[1] This provision of the statute has not been changed since the Petitioner first violated the law in Case No. 86-548. See section 948.06(1), Florida Statutes (1985).

against the newly imposed incarcerative sentence. Community control is not the functional equivalent of jail for the purpose of credit for time served. Swain v. State, 553 So. 2d 1331, 1333 (Fla. 1st DCA 1989). Nor is it the functional equivalent of probation. Williams v. State, 629 So. 2d 174, 176 (Fla. 2d DCA 1993). Thus, it is the State's position that, upon revocation of probation, a trial court can impose community control without giving credit for time previously served on probation. Moreover, on revocation of community control, the trial court can impose an incarcerative sentence without giving credit for time previously served on community control or probation. Swain, 553 So. 2d at 1333; §948.06(2), Fla. Stat. (1993). The State is not unmindful of the holding in Fraser v. State, 602 So. 2d 1299 (Fla. 1992), wherein this Court ruled that Fraser, based on the peculiar facts of his case, should get credit for time illegally spent in community control when he was legally sentenced to prison based on a violation of that illegal sentence of community control. The State submits that the holding in Fraser prevented an unfair result on the unusual facts of that case and has no relevance to the case here. See Straughan v. State, 636 So. 2d 845, 847 (Fla. 5th DCA 1994)(Peterson, J., specially concurring). As this Court noted, Fraser was being subjected to prison not because he breached the trust placed in him by the trial court, but rather because his community control sentence was illegally imposed. Unlike the instant case, the court in Fraser "was not confronted ... with a situation in which a defendant has transgressed and is therefore rightly facing an increased punishment." Fraser, 602 So. 2d at 1300.

Where a probationer absconds from supervision, he does not get credit for the time he is absent because his probationary period is tolled until he is once more placed under probationary supervision. Ware v. State, 474 So. 2d 332, 333 (Fla. 1st DCA 1985). However, for the trial court to continue to have jurisdiction to revoke probation and impose an appropriate sentence even after the original term of probation was to have expired, the revocation process must be set in motion during the probationary period (e.g., by the filing of an affidavit alleging violation of probation or the issuance of a warrant based on such affidavit). Harris v. State, 525 So. 2d 449 (Fla. 2d DCA 1988). Otherwise, if the affidavit is filed after that time, the trial court would be divested of jurisdiction to consider the violation . State v. Hall, 641 So. 2d 403 (Fla. 1994). The affidavit was timely filed here prior to the end of the probationary period.

Petitioner's Reasoning

In the instant case, the Petitioner essentially presents the following line of reasoning: 1) because the offense in each case was a third-degree felony, the statutory maximum sentence the trial court could impose in each case was five years; 2) because the sentence in Case No. 86-548 was initially imposed on October 16, 1986, the trial court was without jurisdiction to extend the Petitioner's sentence in that case beyond October 16, 1991; 3) because the sentence in Case No. 87-2359 was initially imposed on March 17, 1988, the trial court was without jurisdiction to extend the Petitioner's sentence in that case beyond March 17, 1993.

Based on this reasoning, the Petitioner argues that the trial court committed error when it continued to sentence him after those jurisdictional dates. The Petitioner's reasoning is fatally flawed because it fails to take into account that, if a violation affidavit is filed during the term of probation or community control, the trial court will continue to have jurisdiction to punish the violation even after the probation or community control was to have terminated. Otherwise, an offender could abscond with impunity, provided he can avoid being captured and subjected to revocation proceedings during the remainder of his community control or probationary period.

Application of the Law to the Facts of the Instant Case

A review of the facts of the instant case demonstrates that despite numerous opportunities, the Petitioner failed to successfully complete either probation or community control and that violation proceedings were instituted prior to the end of these periods. Thus, the trial court had jurisdiction to appropriately punish the Petitioner at every stage of his punishment. For the sake of clarity, each stage of Petitioner's punishment is analyzed below.

The Petitioner's Probation

The Petitioner had been on probation for resisting arrest with violence in Case No. 86-548 from October 1986 until December 1987 (approximately 14-15 months) when he violated probation by possessing cocaine. (R 30-34). Consequently, the Petitioner's

original 1986 probation was revoked and he received a five-year sentence of probation in Case No. 86-548 which was to be concurrent with his five-year probationary sentence in Case No. 87-2359, i.e., his new 1987 offense of cocaine possession. (R 41-44, 153-56). Arguably, the Petitioner abided by the conditions of his concurrent probationary sentences from around March or April of 1988 until May of 1991 (approximately 37-39 months)[2] when his probation officer filed separate affidavits alleging that the Petitioner had violated his probation in both cases. (R 56, 166). These affidavits indicate that the Petitioner had apparently absconded[3] from supervision as of "3-23-91." The Petitioner apparently remained absconded until he was arrested on December 26, 1991. (R 61). In response to this flagrant violation of probation, the trial court, in February 1992, placed the Petitioner into community control for concurrent periods of two years each in Case Nos. 86-548 and 87-2359. (R 78).

The State recognizes that, under the holding in Moore, supra, the Petitioner should have received credit for the time he had

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[2] The record is unclear as to whether the Petitioner should be given this much credit for complying with probation. It appears that in December 1989, the Petitioner violated his probation by committing battery on his spouse and by "unlawful possession of a suspended driver's license" (R 49); it further appears that he absconded from supervision until his arrest in July 1990 (R 50); and, moreover, it appears that he was incarcerated for these offenses for approximately one month until August 1990 when he was sentenced to time served (R 54).

[3] The Petitioner's point about the probation officer's belief that the Petitioner had absconded from supervision as of March 1991 is well taken. (IB 17). However, this does not change the fact that the Petitioner's probation was tolled when the affidavits were filed on May 17, 1991. (R 56, 166).

already spent on probation against his new five-year probationary sentence in Case No. 86-548 which was imposed in April 1988. (R 41-44). This oversight, though, was really of no consequence because even if the Petitioner's probation in Case No. 86-548 had been adjusted to terminate by October 1991 (as the Petitioner advocates), he still would have violated it when he "failed to report or submit monthly reports for the months of February, March and April of 1991." (R 56). Likewise, even though it was some four months after October 1991 before the Petitioner was brought to justice for his 1991 violations of probation, the trial court still would have had jurisdiction to place the Petitioner into community control because his probation was tolled when the affidavits (R 56, 166) and warrants (R 57, 167) were filed in May 1991. Ware, 474 So. 2d at 333; Harris, 525 So. 2d at 452.

The Petitioner argues that this Court's holding in Hall supra, means that a probationary period is not tolled by the filing of an affidavit of violation. (IB 17). The Petitioner is mistaken. In Hall v. State, 625 So. 2d 1310 (Fla. 3d DCA 1993), the appellate court affirmed the trial court's revocation of Hall's probation based upon the original affidavit, but struck the findings of violation based upon allegations contained in an "untimely filed amended affidavit of probation violation." Id. at 1311. This Court approved the appellate court's decision. Hall, 641 So. 2d at 405. Thus, the filing of an affidavit of probation violation during the probationary period effectively tolls the probationary period for purposes of a trial court's retaining jurisdiction to punish the violation alleged in the affidavit.

The Petitioner's Community Control

Upon revocation of the Petitioner's probation, the trial court had authority to place the Petitioner into community control or to incarcerate him under Section 948.06(1), which states in pertinent part:

> 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 into community control.

[emphasis supplied]. Furthermore, the trial court was not required, or even permitted, to give him credit for the time he spent on probation. Williams, 629 So. 2d at 176; §948.06(2).

The Petitioner had not even served half of his community control when he materially violated its conditions as of January and February 1993. (R 83). The record indicates that the Petitioner admitted his violations on May 18, 1993 (R 89), and that his community control was reinstated on June 8, 1993. (R 91, 94; T 4-6). However, by September, the Petitioner was again violating his community control. (R 96). Another warrant was issued for the Petitioner's arrest (R 95) which occurred on September 29, 1993. (R 97). On October 19, 1993, the trial court rejected the Petitioner's plea of no contest and scheduled an evidentiary hearing for the following month. (T 3). Finally, at the close of the evidentiary hearing held on November 16, 1993, the trial court

revoked the Petitioner's community control and imposed an incarcerative sentence of four and a half years upon the Petitioner (T 26) with 450 days credit for time served. (T 30).

The Petitioner's Incarceration

Just as it could place the Petitioner into community control or sentence him to prison for violating probation, the trial court could, upon revoking his community control, sentence the Petitioner to prison. §948.06(1), Fla. Stat. (1993)("If . . . community control is revoked, the court shall . . . impose any sentence which it might have originally imposed before placing the probationer . . . into community control."). In accordance with Holmes, supra, the trial court credited Petitioner with jail time previously served on the underlying felonies when it pronounced his sentence. (T 30). As discussed above, the trial court was not required to give the Petitioner credit for time previously served on community control or on probation. Swain, 553 So. 2d at 1331; §948.06(2), Fla. Stat. (1993).

The Petitioner cites Teasley v. State, 610 So. 2d 26 (Fla. 2d DCA 1992), to support his argument for overturning the trial court's decision below. It is true that in Teasley, as in the instant case, the punishment imposed for a third-degree felony progressed from probation to community control to prison — however, there is a significant difference between the two cases. In Teasley, both the community control and the prison sentence were imposed after the original five-year probation should have terminated. Moreover, the probation revocation, as well as the

community control revocation, was not set in motion until after Teasley's probation (i.e., the five-year maximum sentence) should have terminated. In the instant case, the revocation of the Petitioner's probation, as well as his community control, was set in motion before the statutory maximum sentence was reached in either of his third-degree felony cases. Therefore, the trial court properly retained jurisdiction at each stage of the Petitioner's punishment.

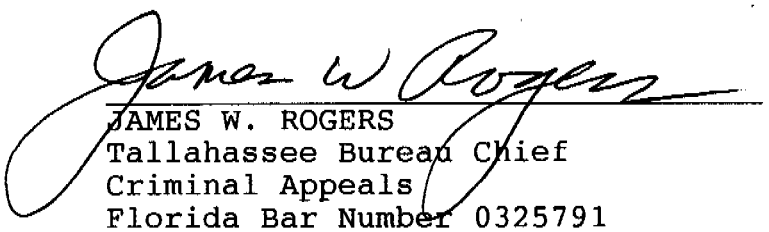
In summary, Petitioner is not being unfairly sentenced to a term of incarceration; he is being justly sentenced to incarceration because he persists in violating less restrictive conditions placed on him.

CONCLUSION

Based upon the above arguments and citations to legal authorities, the State urges this Honorable Court to affirm the decision below.

Respectfully submitted,

ROBERT A. BUTTERWORTH
Attorney General



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TCR 94-112046

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to **MS. TERRY CARLEY**, Assistant Public Defender, Office of the Public Defender, Second Judicial Circuit of Florida, Leon County Courthouse, Fourth Floor North, 301 South Monroe Street, Tallahassee, Florida 32301, this 27th day of February, 1995.

William J Bakstran

WILLIAM J. BAKSTRAN