IN THE SUPREME COURT OF FLORIDA

TERRY WAYNE EANES, :

Petitioner, :

v. : CASE NO. 84,787

STATE OF FLORIDA, :

Respondent. :

_____/

PETITIONER'S REPLY BRIEF ON THE MERITS

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ARGUMENT

ISSUE: THE LOWER COURT IMPROPERLY RETAINED JURISDICTION OVER THE PETITIONER 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.

If this case involved a situation in which an affidavit of violation of community control was filed before the maximum sentence allowed by statute ran, the trial court would have had jurisdiction to sentence Petitioner as it did. However, this was not the situation presented here since the affidavits of violation of community control upon which this appeal is based were filed long after the five year maximum sentences allowed for third degree felonies ran.

The State contends that, so long as the affidavit of violation is filed before the end of each successive sentence, a court can continue extending probation and community control after the original maximum statutory sentence has expired.

This logic defies the reasoning of cases such as those cited in Petitioner's brief. State v. Summers, 642 So. 2d 742 (Fla. 1994); Wardell v. State, 642 So. 2d 745 (Fla. 1994); State v. Roundtree, 644 So. 2d 1358 (Fla. 1994); Jost v. State, 631 So. 2d 1131 (Fla. 5th DCA 1994); and Straughan v. State, 636 So. 2d 845 (Fla. 5th DCA 1994). All of these cases clearly show that the sentence allowed by statute begins when a defendant is found guilty and sentenced. Under the State's reasoning, probation and community control could continue ad infinitum, contrary to the Florida Legislature's intent.

A defendant in Florida who is convicted of a third degree felony can be sentenced to:

> 1. A probationary period which does not exceed five years, or
> 2. A combination of community control and probation which does not exceed five years, or
> 3. A combination of probation and incarceration which does not exceed five years, or
> 4. A combination of community control and incarceration which does not exceed five years, or
> 5. A combination of probation, community control, and incarceration which does not exceed five year.

If that defendant is found to be in violation of probation or community control he can be sentenced to up to five years of incarceration, provided that he is given credit for any time previously spent in jail or prison. Under Summers and Roundtree, if he is found in violation he can be placed on probation or community control for up to five years, provided

he is given credit for any time previously served on probation and community control, and in jail or prison.

A careful reading of Petitioner's statement of the facts and that of the State should indicate to the reader just how difficult it is to interpret the record in this appeal. Petitioner believes that his statement of the facts is correct.

The State's assumption that Petitioner absconded during a portion of the time period relevant to this case is just that - an assumption. 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)

It is important to note that the State presented this assumption to the First District Court of Appeal in both its answer brief and oral argument. The District Court did not address the State's contention, thereby demonstrating that it did not find the argument persuasive. Absent a finding by the

trial court that Petitioner was absconded, it must be assumed that he was not. The State's position that Petitioner's probation was tolled cannot stand since there was no finding or admission that he absconded.

Under Hall v. State, 641 So. 2d 403 (Fla. 1994), the filing of an affidavit of violation does not toll a probationary term. If it did, the amended affidavit in Hall would have been valid. Instead, the filing of an affidavit tolls the running of the trial court's jurisdiction. The filing of an affidavit cannot toll probation or community control because the court must find the defendant in violation for there to be a violation.

The State cites to Ware v. State, 474 So. 2d 332 (Fla. 1st DCA 1985), and Harris v. State, 525 So. 2d 449 (Fla. 2d DCA 1988), to support its contention that Petitioner's probation was tolled when affidavits of violation and warrants were issued. In fact these cases do not provide support.

In Ware the defendant admitted that he had absconded during the probationary period and the court found him in violation because of this, as well as other reasons. The period of time during which he was absconded did not count toward his probationary term. Such is not the case in Petitioner's situation. In Harris, at 452, the Second District Court of Appeal wrote that "if a warrant for the probationer's arrest, based on alleged violations of probation, issues during the term of probation, the court has jurisdiction to consider the alleged violations even if the probationary term expires

before the time of arrest and/or hearing". The Second District did not find that the probation itself was tolled for the purpose of determining the length of time spent on probation. Rather, the court found that a trial court retained jurisdiction in those circumstances.

In its brief, the State also relies on State v. Holmes, 360 So. 2d 380 (Fla. 1978). It should be noted that the holding in that case was limited by Summers to prevent crediting time spent on probation toward sentences of incarceration.

The State is correct that the Petitioner did not successfully complete probation or community control. It incorrectly concludes that as a result, he should not receive credit as though he did. Such is not the law in this state. A finding of violation does not vitiate all of the time spent on probation or community control from the time it was imposed. Moore v. State, 623 So. 2d 795 (Fla. 1st D.C.A. 1993); Blackburn v. State, 468 So. 2d 517 (Fla. 1st D.C.A. 1985). Also Conrey v. State, 624 So. 2d 793 (Fla. 5th D.C.A. 1993), a fifth district opinion reaching the same result; Davis v. State, 623 So. 2d 579 (Fla. 3d D.C.A. 1993).

The State's reliance on Williams v. State, 629 So. 2d 174 (Fla. 2d DCA 1993), for the proposition that community control is not the functional equivalent of probation is misplaced. Williams was decided before this Court's opinion in State v. Roundtree, 644 So. 2d 1358 (Fla. 1994). The same is true of Fraser v. State, 602 So. 2d 1299 (Fla. 1992), also cited by the State in its brief.

The State contends the following on page 13 of its brief:

> [T]he Petitioner argues that the trial court committed error when it continued to sentence him after [October 16, 1991 and 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.

The State's argument seems to be that the statutorily mandated maximum sentence for a crime has no bearing on a defendant's actual sentence. Under this reasoning, a trial court's sentence of probation or community control is all that is necessary to establish the court's continuing jurisdiction, regardless of whether the sentence was of a legal length under the statutes of this state.

Petitioner's sentences in the two cases were completed on October 16, 1991, and 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)

If the position of the state 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.

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by delivery to Mr. James Rogers, Assistant Attorney General, The Capitol, Plaza Level, Tallahassee, Florida, and a copy has been mailed to appellant, on this 21st day of March, 1995.

TERRY CARLEY